P. O. Thweatt

THE

HOUSE OF LORDS CASES

ON

APPEALS AND WRITS OF ERROR, AND CLAIMS OF PEERAGE,

DURING THE SESSIONS

1860, 1861, AND 1862.

BY CHARLES CLARK, ESQ.,

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

BY APPOINTMENT OF THE HOUSE OF LORDS.

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MEMORANDA.

On the morning of Sunday, 23d June, 1861, at Stratheden House, died suddenly The Right Hon. John Lord Campbell, Lord High Chancellor.

On the 26th June, 1861, the Great Seal was delivered to Sir Richard Bethell, the Attorney-General, who was at the same time created a Peer, by the title of Baron Westbury of Westbury, in the County of Wilts.

Sir W. Atherton, the Solicitor-General, succeeded his Lordship in the office of Attorney-General.

Roundell Palmer, Esq., Q.C., was appointed Solicitor-General, and shortly after received the honor of Knighthood.

JUDGES AND LAW OFFICERS

DURING THE PERIOD OF THE DECISIONS REPORTED IN THIS VOLUME.

Lord Chancellor:

LORD CAMPBELL.
LORD WESTBURY.

Lords Justices:

RIGHT. HON. SIR. J. L. KNIGHT BRUCE.
RIGHT HON. SIR G. J. TURNER.

Master of the Rolls:

RIGHT HON. SIR JOHN ROMILLY.

Vice-Chancellors:

SIR R. TORIN KINDERSLEY. SIR JOHN STUART.
SIR W. PAGE WOOD.

Lord Chief Justice of the Queen's Bench:

RIGHT HON. SIR A. J. E. COCKBURN, BART.

Lord Chief Justice of the Common Pleas.

RIGHT HON. SIR W. ERLE.

Lord Chief Baron of the Exchequer:

RIGHT HON. SIR FREDERICK POLLOCK.

Judge of the Court of Probate and Judge Ordinary:

RIGHT HON. SIR CRESSWELL CRESSWELL.

Attorney-General:

SIR R. BETHELL. SIR W. ATHERTON.

Solicitor-General:

SIR W. ATHERTON. SIR ROUNDELL PALMER.

IRELAND.

Lord Chancellor:
RIGHT HON. MAZIERE BRADY.

Lord Justice of the Court of Appeal:
RIGHT HON. FRANCIS BLACKBURNE.

Master of the Rolls:
RIGHT HON. T. B. C. SMITH.

Lord Chief Justice of the Queen's Bench:
RIGHT HON. THOMAS LEFROY.

Lord Chief Justice of the Common Pleas:
RIGHT HON. JAMES H. MONAHAN.

Lord Chief Baron of the Exchequer:
RIGHT HON. DAVID R. PIGOTT.

Attorney-General:
RIGHT HON. J. D. FITZGERALD.
RIGHT HON. THOMAS O'HAGAN.

Solicitor-General:
MR. SERJEANT DEASY.
JAMES A. LAWSON.

TABLE OF CASES.

REPORTED IN THIS VOLUME.

For the purpose of facilitating reference, the names of the cases are repeated, with the defendant's or respondent's name standing first, when the *v.* is placed after the plaintiff's or appellant's name, and the subject-matter of the case is not inserted.

TABLE OF CASES CITED.

Those in *italics* have been commented on, impeached, or overruled.

CASES

IN THE

HOUSE OF LORDS.

LAMBERT *v.* PEYTON.

1860. Feb. 24, 27.

WALTER RATHBONE LAMBERT, *Appellant.*
RICHARD REYNOLDS PEYTON, *Respondent.*

Marriage Settlement. Executory Articles. "Issue Male." Grandson of Daughter. Power. Decree. Legal Estate. Competency of Appeal. Costs.

In marriage articles in 1802 (which were to be, but never were, followed by a formal settlement), two separate estates, one belonging to the intended husband, the other to the intended wife, were included. Both were vested in trustees, in trust to permit the husband and wife to receive the profits during life, and (as to her portion), should she survive her husband, "to such of her *issue male* by her said husband as she may, by her last will and testament, notwithstanding her coverture, direct, limit, or appoint;" and in case of no appointment, to the "issue male" of the husband and wife; and in case of no issue male, then to go amongst her daughters; "and in case of failure of issue male or female then to go to such person or persons" as she should appoint. There were two children of the marriage, a son and a daughter. The wife survived the husband many years, and made a will, which, reciting the power reserved to her by the articles, appointed her property to her grandson, the son of her daughter, describing him as "issue male" of her marriage:—

Held, that the articles were executory; that if in accordance with them a settlement had been executed, the estate would have been put in strict settlement, and that the power reserved by them was not well exercised, the grandson, the son of a daughter, not coming within the description of "issue male" therein contained. The lady married again, and in the settlement on this second marriage, * the surviving trustee of the articles *2

"granted, released, and confirmed" to the trustees under the second settlement, "all his right" to "the use and behoof of" the widow as under the articles: —

Held, that setting up a claim to the estate under the appointment by her, the grandson could not, as an objection to a suit to compel him to convey the estate in specific performance of the marriage articles, insist that the legal estate was not in him; nor could he object to the decree in this suit that it dealt only with the property over which the wife had assumed to exercise a power of appointment, and not with the whole property included in the marriage articles.

The decree directed a conveyance, but did not, in form, declare the rights of the parties. *Held*, that this was defective.

There had been an objection to the competency of the appeal. The appeal committee directed that objection to be heard before the House. The question of competency was decided in favor of the appellant. The appeal was then heard, and was dismissed on the merits, with costs. The costs incurred by the objection to the competency of the appeal were directed to be deducted from the general costs.

THIS was an appeal against a decree of the Court of Chancery in Ireland, directing the appellants, according to certain marriage articles dated in 1802, to convey to the respondent an estate called Loughscur, in the county of Leitrim. In the year 1802, two ladies, named Bridget and Mary Ann Reynolds, were tenants in common of the estate in question: Mary Ann was about to marry Colonel John Peyton; that gentleman was himself possessed of an estate called Laheen, in the same county. In anticipation of the marriage, certain "articles of agreement" were entered into for the purpose of settling the respective properties. These articles recited the intended marriage, and that it was agreed to vest the Laheen estate in two trustees, in trust to permit the said John Peyton to receive the rents during his life, and after his death to pay to his intended wife, Mary Ann Reynolds, for life, in case she survived her said husband, the annual sum of 300*l.* if there should be no issue of the marriage, or 200*l.* in case there should
*3 be *such issue, and to permit the issue in her lifetime and after her death to take the remainder of the profits, the same to go to such of the issue as John Peyton should appoint; and in case of no issue, to the right heirs of J. Peyton for ever. And as to the moiety of the estate of Loughscur, to which Mary Ann Reynolds was entitled (subject to some incumbrances which could not then be ascertained), it was "granted," &c., to the same trustees, in trust to raise, by sale or mortgage of part of the estate, enough to pay off existing debts; then to permit the said J. Peyton to

receive the rents, &c., for his life, and after his decease to permit M. A. Reynolds during her life, "in case she shall survive her said husband,[1] and also to *such of her issue male* by the said J. Peyton, as she may by her last will and testament, notwithstanding her coverture, direct, limit, or appoint; and in case of no appointment, to *the issue male* of the said J. P., and the said M. A. R.; and in case of *no issue male*, then to go to and amongst her daughter or daughters, as the case may be; and in failure of *issue male or female*, then to go" to such persons as she might appoint. The articles concluded thus: "And it is farther agreed upon by and between the said parties that proper and legal deeds of settlement shall with all convenient speed be prepared and executed pursuant to the agreements aforesaid, as usual in such cases; and to acknowledge or suffer any fines or recoveries, as counsel learned in the law shall reasonably advise, to carry the intent of those articles into execution."

No settlement was ever executed, nor was any appointment made by the husband under the articles; he died in 1805, leaving a son, John Reynolds Peyton, and a daughter, Jane Peyton, him surviving. Mrs. Peyton lived for many *years, and *4 married again in 1817, on which occasion the surviving trustee of the articles "granted, released, and confirmed, &c.," to the trustees under the new settlement, all his right, &c., to hold to the use of the widow as under the articles. This second husband died without issue, in the lifetime of his wife.

John Reynolds Peyton, the son of Colonel Peyton, married in 1836, and by his settlement, then made, in which he described himself as tenant in tail of the Loughscur estate, he settled it to the uses of that marriage. He had issue two sons, of whom the respondent was the elder. Jane Peyton, the daughter, married Mr. Lambert, and had two sons, of whom the elder was the appellant.

In February, 1855, Mrs. Peyton, his mother, made her will, in which, after reciting the "articles," she said, "I do hereby give, devise, and appoint all such portions of said settled estates as I have disposing power over, to the use of my grandson, Walter Rathbone Lambert (being one of *the issue male* of said marriage), for the life of him the said Walter;" and after his death, to his brother, G.

[1] It was admitted on all sides, that some words had been, by accident, omitted from this part of the instrument. The mistake arose in copying the draft.

N. R. Lambert ("another of the issue male of said marriage") for ever. Mrs. Peyton died about a month after making this will, and the present appellant entered into possession of the Loughscur estate.

In September, 1855, John Reynolds Peyton, the only son of Colonel Peyton, filed his cause petition in Chancery, praying that the appellant might be directed to convey to him the Loughscur estate, in accordance with the provisions of the "articles" of 1802, so far as the same were consistent with the settlement of 1835. Neither the trustees of the "articles" of 1802, nor the trustees of the settlement of 1817, were made parties to this suit. J. R. Peyton, the plaintiff in the suit, died in November, 1855, and the suit was revived by his son, the present respondent. The *5 *question raised was, whether the appointment to the appellant in the will of February, 1855, was not void, he not coming within the description of "issue male," according to the true construction of the "articles" of 1802. On the 22d January, 1856, a decree was pronounced in accordance with the prayer of the cause petition. It was brought by appeal to this House, and a question of the competency of the appeal was raised, after being discussed in the appeal committee, was argued, and decided in this House.[1] The appeal was then heard on the merits.

Mr. Isaac Butt (of the Irish bar) and *Mr. Smethurst* for the appellant.—The real contest here is, whether, under the settlement of 1802, the estate must go to a son of a son, or may be appointed to the son of a daughter.

The words "issue male" in that settlement have not necessarily a strict technical meaning. Such words, and words of a more technical kind, have often been construed so as to meet what must have been the intention of the parties. Thus the words "in tail male" have been held to be descriptive not of the issue, but of the interest they were to take, *Trevor* v. *Trevor*;[2] and under a limitation "to A. B. and his issue in tail male, in strict settlement" daughters were allowed to take. In this case, "issue" is a word not of limitation, but of purchase, and therefore applies to grandchildren and refers to all generations, *Hampson* v. *Brandwood*,[3] *Dalzell* v. *Welch*[4] (where the word "issue" was held to require

[1] 7 H. L. Cas. 423.
[2] 1 H. L. Cas. 239.
[3] 1 Madd. 381.
[4] 2 Sim. 319.

the appointment of grandchildren), and *Evans* v. *Jones;*[1] while the word "male" qualifies the person to which it is attached, but *not the descent. There is not, therefore, any general *6 rule by which the words "issue" and "male," as found together in this settlement, must have a restricted application given to them, so as to confine them to the son of a son. In *Roddy* v. *Fitzgerald*,[2] the words "heir male of the body," though words of a very strict and technical kind, were held to be applicable to the son of a daughter. The cases show that "issue" is a word applicable to every descendant, and peculiarly to grandchildren, who, in default of appointment, would be entitled to have the estates amongst them; and, therefore, even coupling with it the word "male," the appointment here to a grandson is valid.

Admitting, therefore, that the articles of 1802 were executory, though they strictly and accurately constitute a deed, and gave a clear life estate both to the husband and to the wife, and though all the parties have acted on them as if they formed a perfect settlement, the proper construction of them will not defeat the appointment now made in favor of the appellant.

The remedy here is not the proper one, nor has the decree been properly drawn up. If the deed of 1802 is only executory, then the legal estate is in the trustees of that deed; the present appellant has it not, and he cannot convey it. Yet he is the person ordered to convey.

Nothing is said in the decree respecting the Laheen estate, or with respect to the annuity charged thereon in favor of Mrs. Peyton, nor are any persons representing that estate made parties to the suit. Yet if the claim of the respondent is founded on the deed of 1802, and he prays to have its provisions carried into effect, he must so pray with respect to all, and not merely to a part of them. Nor is there any declaration of the rights of the parties *under that deed, nor are there any directions as to the *7 way in which the decree is to be carried into effect.

The *Attorney-General* (*Sir R. Bethell*) and *Sir H. Cairns* (*Mr. J. M'Mahon*, of the Irish bar, was with them) for the respondent.—First as to the legal estate. That is not given to the trustees, except for the purposes of the articles themselves during

[1] 2 Coll. Ch. 516.

[2] 6 H. L. Cas. 823.

the life of Mary Ann Reynolds. Indeed it might be a question whether there was any thing in them but a mere power to raise money by sale or mortgage. But on the second marriage of Mrs. Peyton, the surviving trustee under the articles of 1802 conveyed it to the trustees under the new settlement, to the use of her and her issue, and it may be a question whether that did not divest the trustees of 1802 of any power they before possessed. After that, she, in 1853, executed a disentailing deed, which was to give the estate absolutely to her for such purposes as she should appoint. She has appointed to this appellant; but the respondent alleges that what she has done is not warranted by the articles of 1802, under which she represents herself to have acted. The appellant, who claims to be in possession of the legal estate as given to him by his mother, is therefore the proper person to be ordered to convey it.

As to there being no directions with regard to the Laheen estate, or the annuity charged upon it, the answer is, that the appellant does not pretend to set up a claim to that estate, and the annuity charged on it is gone by the death of his grandmother, for whose benefit alone it was created.

The only real question here is, whether the instrument of 1802 was executory or executed. The respondent alleges the former. It was a mere set of articles in contemplation of a marriage, with a declaration that a settlement in conformity with the inten-
*8 tions therein expressed, and such as *counsel should advise, should be executed. If so, this must be construed as a settlement made in accordance therewith would have been construed: *Rochfort* v. *Fitzmaurice*[1] is decisive on this point. That was a case of a post-nuptial contract, and in it Lord Chancellor Sugden declared that in marriage settlements the nature of the instrument led to the conclusion, that limitations in strict settlement are intended. So in *Glenorchy* v. *Bosville*,[2] upon a devise to trustees on trust on the marriage of D. to convey an estate to her and to the issue of her marriage, it was upon the same principle decreed, that the estate to her must be for life only and to the issue in strict settlement. And that is, in fact, the doctrine which is adopted in Fearne.[3]

Here, however, there is little need of authorities. It may be

[1] 2 Drury & War. 1. [2] Cas. temp. Talb. 3. [3] Cont. Rem. 116–161.

admitted, that in the cases cited, "issue male" might have an equivocal meaning. But, in this case, that phrase is actually contrasted with daughters, and on the failure of both, of sons first and daughters afterwards, the estate is to go over. The distinction between the two is most plainly pointed out in the instrument itself. It is true that these are articles before marriage, and not an executed settlement; but as to them, Fearne[1] sums up the authorities by declaring that equity will direct a settlement in conformity with the terms of the articles.

Mr. Butt replied.

THE LORD CHANCELLOR (LORD CAMPBELL).—My Lords, this case has been most ably argued on the part of the appellant by *Mr. Butt.* We decided in his favor with respect to the competency of the appeal, but I must say, with respect to the points he has made in arguing * the merits of the appeal, that I am clearly *9 against him.

With regard to the preliminary point, as to the appellant not having the legal estate, I think that we may dispose of that without any difficulty, because I think it is quite clear, under the circumstances in which they stood, and the defence they made, and the claim set up, that it is not competent to them to say that they have not the legal estate.

With regard to the omission from the decree of any settlement of the Laheen estate, I think *Mr. Butt* himself has clearly shown, that if the Lamberts were entitled to any beneficial interest under the settlement which they could have of the Laheen estate, that ought to have been comprehended in the decree pronounced by the Court; and if they are aggrieved by that omission, I think it is competent to them now to make that objection to the decree. But when I look at the terms of the articles of 1802, it seems to me that they are not aggrieved by that. There is nothing omitted from the decree that would be of any service to them, and there is nothing included in it of which they have any reason to complain. On looking at the terms of the deed, it seems to me that it is executory with regard to the settlement of the Laheen estate, as well as of the Loughscur estate, and that the settlement that ought to have been made of that estate would have been a strict

[1] Cont. Rem. 90.

settlement, when the appellants would have had no beneficial interest.

With regard to the annuity given by the deed, it seems to me quite clear, that the annuity was not meant to be a perpetual annuity, but that it was to cease with the life of Mary Anne, and, therefore, would fall into the *corpus* of the Laheen estate, and, therefore, the settlement would comprehend both the *corpus* *10 of the Laheen estate and the * annuity. The objection fails, therefore, that the settlement of this annuity is not comprehended in the decree which has been pronounced.

Now, with regard to the Loughscur estate: *Mr. Butt* allowed it was impossible to deny that the articles were executory. This must clearly be considered as an executory deed. If any language can create such a deed, this language does create it. *Mr. Butt* was right in saying that this is a strict and accurate deed, and is to be so considered so far as it gives an estate for life to the husband and an estate for life to the wife. But when we come to the settlement of the estate beyond that, it is clear as noonday that it is executory, and that it was understood between the parties that a subsequent deed should be executed for the purpose of properly carrying out their intentions. With respect, then, to the Loughscur estate, the words used are not to be considered as words occurring in an instrument under seal, but as words used in an executory trust, and they are to receive the force which they would receive in any executory deed. It was the meaning of the parties that Mrs. Peyton should have the power to appoint to the sons of her husband. But I am clearly of opinion that it was not within the meaning of the parties that this should be the final settlement, but that the meaning of the parties was that there should be a settlement upon what is commonly called strict limitations.

The very first words that are used in the deed seem to me to create a doubt whether "a son of a daughter" would be within the language of the deed. And though there may be flexible words used in a deed that will admit of one construction or another, the construction depending upon their collocation, to cite cases upon the point is merely a waste of time, because those decisions are hardly of any assistance in enabling us to *11 come to any conclusion as to the * sense in which they are used in the instrument in question. Now the words here

are "from and immediately after his decease to permit and suffer the said Mary Anne Reynolds during the term of her natural life" to appoint; there are some words omitted here by accident, probably the deed was not correctly copied from the original draft, but she has the power to appoint "to such of her *issue male* by the said John Peyton as she may, by her last will and testament, nothwithstanding her coverture, direct, limit, or appoint." Now, if it stopped there, I should say that, *primâ facie*, although a grandson by a daughter might be included, he was not included, but that this meant the sons of the male heirs. The words are, "also to such of her issue male by the said John Peyton as she may appoint." My construction of the words "issue male," as there used, would be to confine them to such of her sons by the said John Peyton as she may appoint. This gives her, therefore, a power of appointment to the second or younger son, had she so pleased, if she had any such by John Peyton.

Then when we come to see what follows, I think that that meaning, and that meaning alone, can be put upon it, because we have to see in what sense were used those words, "and in case of no appointment to the issue male of the said John Peyton and the said Mary Anne Reynolds, and in case of no issue male, then to go to and amongst her daughter or daughters, as the case may be, share and share alike." Now when we look at the general scheme of the settlement, we see that it is to go first to the sons and then to the daughters; it is to go to the daughters as tenants in common in tail. And then comes this provision, "and in failure of issue male or female, then to go to such person or persons" as she may appoint; it seems to me that, seeing the sense in which the words "issue male" were used * in the instrument, *12 her power of appointment was confined to the sons of the marriage, and did not extend to the son of a daughter. Under these circumstances, though this is a clumsily drawn deed, I think the power of appointment exercised by her was not such a power as she had under the deed, this being an executory trust which was to be carried into effect by a subsequent deed in strict settlement, and that therefore the decree was right. I consequently advise your Lordships that this appeal should be dismissed with costs.

LORD BROUGHAM. — My Lords, I have only heard half the argu-

ment in this case, and I therefore abstain from expressing an opinion upon it.

LORD CRANWORTH.—I agree with my noble and learned friend on the woolsack, that this decree ought not to be disturbed. I purposely guard my opinion by the expression that I think it ought not to be disturbed, because I must say I think it is a matter of regret that the decree did not proceed to determine more explicitly what the rights of the parties were, instead of merely directing some conveyances and giving some consequential directions, which no doubt were the results of the conclusion at which the Court had come in its own mind. What the rights of the parties were, I do not see expressly declared. But looking to the articles (for so I must call them), with the object of carrying them into execution in this case, I think that this decree does substantial justice to all the parties concerned. The articles relate to two estates, the Laheen and the Loughscur estates. The Loughscur estate alone is referred to in the decree of the Lord Chancellor of *13 Ireland, and the main question is, whether* that decree was right. Now as to the Loughscur estate, what the decree substantially directed is this, that a settlement shall be made of it upon the principle that the only son of the marriage was tenant in tail under these articles. I think that is quite a correct conclusion that he was tenant in tail, and that his right as tenant in tail has not been disturbed by the appointment executed by the wife. I come to that conclusion on the ground alluded to by my noble and learned friend on the woolsack, namely, that the settlement was to be upon the parents for life; and then after the death of the parents, I think it must be read in this way, "upon the issue male of the said John Peyton and Mary Anne Reynolds," which would mean, in these executory articles, that it was to be settled upon the first and other sons successively in tail or tail male (it is immaterial which), with a power of appointment in the wife to select any one or more of those sons, as she should think fit. Although I quite agree in the argument that you might have an instrument so worded that the son of a daughter would come under the description of "issue male," I think that is not the *primâ facie* construction, and certainly not the construction to be put upon these articles. I think, therefore, that the Lord Chancellor of Ireland was right in holding that under these arti-

cles the conveyance to be executed must be a conveyance giving the estate in tail to the only son of the marriage. He suffered a recovery, or rather executed a disentailing deed after recoveries were abolished, which resettled the estate, and therefore the conveyance was very properly directed to be made according to the uses of this resettlement.

Upon that which we may call the fringe of the case, it was said that the legal estate was not in these parties. Whether it was or was not, is, in my opinion, quite immaterial; * but * 14 I think it was in these parties, because supposing the legal estate to have passed by this conveyance, which I think it did, being a reversion of an expectancy upon leases for years, it passed to two trustees of the names of Reynolds and Johnston. Now it appears that after the death of Mr. Peyton, Mrs. Peyton married a second time a gentleman of the name of Macnamara, and upon this marriage, Reynolds, who was the then surviving trustee, conveyed the legal fee in a manner that leaves it extremely doubtful what was the legal effect of the conveyance. But I rather think that the effect of it was to give the whole legal fee amongst the persons who had the interest under these marriage articles, because it is conveyed to certain trustees "to hold to the use and behoof of the said Mary Anne Peyton, according to her estate and interest therein at the time of, and immediately before the execution of, these presents, until the solemnization of the said intended marriage, and from and after the solemnization thereof, as to the said undivided moiety, share, or proportion of the said towns, lands, tenements, hereditaments, and premises aforementioned, the estate of the said Mary Anne Peyton, to the uses and behoof of the said Richard Macnamara and his assigns, and from and after the decease of the said Richard Macnamara, in case he shall die in the lifetime of the said Mary Anne Peyton, his said intended wife" (an event which has happened) "to the use and behoof of the said Mary Anne Peyton, and her said issue by the said John Peyton, her said first husband, according to the trusts and limitations, and subject to the powers, provisions, and agreements in the settlement." Now supposing that the legal estate was in Reynolds, the result of this deed, executed upon Macnamara's marriage, was to convey it to Mrs. Peyton and her children, according * to her interest under the settlement. It is impossible, * 15

therefore, to say that they had not the legal interest with which the Lord Chancellor of Ireland might deal.

Then, supposing that to be so, the only point remaining is, whether the construction put by the Lord Chancellor of Ireland upon the marriage articles as to the Loughscur estate was correct. A point was insisted upon late in the discussion at your Lordships' bar, that the decree was defective, because it did not provide for the other estate agreed to be settled, namely, the Laheen estate. On that subject, I confess that I had some doubt at one time; but I think there was nothing to provide for, because it was admitted fairly at the bar that no provision need be made for it, if, according to the true construction of these articles, the only son of the marriage had become tenant in tail, or tenant in fee-simple of the Laheen estate. I cannot bring my mind to feel any doubt about the annuity. I think that no annuity was meant to be created, except during the life of Mrs. Peyton the wife, and what was intended to be provided was, that she was to have an annuity, there being issue, of 200*l.* a year for her life, and that, subject to that annuity, the husband was to be entitled to appoint the estate amongst such of his issue as he should think fit. And although it is rather a cumbrous way of providing for the residue during her life, and after her death for the annuity also, that only means to say, that without interfering with her right to the enjoyment of the annuity during her life, he is to appoint to such of the issue as he should think fit. Upon the authority of many well-known cases, the argument was raised upon the construction of these words, that they by implication gave the issue a right to the estate as amongst them, if no appointment was made. On the other hand, it was said by the Attorney-General that that was not
* 16 a fair construction, * because it is not that in this case any thing is given to the issue generally, but only to such of the issue as the husband might think fit to select, and if he does not select any one, then nothing is given. I do not at all mean to say that that is not a fair observation upon the case; but I rather think, according to the true construction of this agreement, that as to the Laheen estate, taking it altogether, this is an agreement to put that estate into settlement, because, though there is a general power of selection given to the husband, there is a provision that in case of no issue, it is to go to the right heirs, which I think

might be fairly interpreted, in construing these marriage articles, to mean that there should be a provision for the issue. But we must look at what is farther provided, that "the settlements" (in the plural) "to be made shall be made according to the usual course in such cases." It appears to me clear that the Court cannot speculate as to what the parties intended with reference to the greater or less value of the one estate over the other, but that it must be taken to mean that the Laheen estate must be settled upon the first and other sons, and then failing them, upon the daughters, and the other estate upon the sons and their successors in tail, and then upon the daughters; and if that is so, the only son was absolutely entitled. On the whole, I think there is no ground whatever to lead me to advise your Lordships to disturb this decree.

Lord Chelmsford. — Although we have no fewer than twenty-five "Reasons" for this appeal, yet, in the result of the argument before your Lordships, the whole question turns upon the effect of the deed of the 23d of August, 1802.

It is perfectly clear, and I think there cannot be the slightest doubt upon the subject, that this was not intended *to be a final settlement between the parties; and for the *17 purpose of proving that, I would go no farther than the last clause in the deed, by which it is agreed that "legal deeds of settlement shall be prepared and executed as usual in such cases, and as counsel learned in the law shall reasonably advise," showing most clearly and distinctly that the parties did not intend this to be an actual settlement between them, but that they contemplated that there would be other conveyances providing that these trusts should be executed in a more careful and accurate manner.

What is the scheme of these articles? They comprehend two estates, one the Loughscur, and the other the Laheen estate; and what the parties appear to have contemplated is, that each should have a power of appointment over his or her own estate, and that if that power of appointment was not executed, then that the estate should be settled. Now, if the estate was to be settled, and to be settled "as is usual in such cases," there seems to be no doubt at all, and that was hardly questioned in the argument, that the proper settlement with regard to the Loughscur estate is, what

is usually called, a strict settlement. The only difficulty that was made upon the subject was with regard to the Laheen estate; and with respect to the Laheen estate, as to the power of appointment, I entertain no doubt that the construction which has been put upon that portion of the articles by my noble and learned friend opposite is the correct one: that, in the first place, the appointment with regard to the annuity was expressed in an awkward manner, but that it was intended that a power of appointment should exist over the residue of the rents and profits, *minus* the annuity during the life of the wife, and that after her death the annuity should become part, in fact, of the rents and profits, *18 and be subject* to the power of appointment. If that be so, there is no difficulty whatever with regard to the annuity which seemed to be the last point to which the appellants clung upon this argument.

What, then, was to be done with the Laheen estate, in case there was no appointment? what settlement was to take place, supposing those articles were to be executed? I agree with my noble and learned friend that as the heirs were only to take in failure of issue, there was an intention that the issue should all of them be benefited by the settlement, and that the settlement therefore of the Laheen estate should correspond with the intended settlement of the Loughscur estate. If that is so, and if the settlement was to be executed as a strict settlement, then it is admitted on the part of the appellants that, although the decree is defective in not providing for the specific performance of the articles with regard to the Laheen estate, yet, if so executed, the appellants would have no right whatever. Although, therefore, the decree ought to have contained some declaration as to the mode in which the Laheen estate should have been settled, yet the appellants have no ground of objection in consequence of this defect in the decree, and consequently, I agree with my noble and learned friends that the decree ought to be confirmed.

Lord Kingsdown.—My Lords, I confess that I cannot arrive at the same conclusion at which my noble and learned friends have arrived, and if the decision of this case had depended upon my opinion alone, I should have thought it desirable, with reference to some points in the case, to take farther time for consideration

before disposing of it. But my doubts *are not suffi- *19
ciently strong to induce me to dissent from the conclusion to which all my noble and learned friends have come.

Application was made for costs.

LORD CRANWORTH. — With respect to the costs there is a cross appeal. If you have paid the costs of that, it might be a question whether they should be repaid.

The Attorney-General. — There was a petition presented to the appeal committee in the usual manner upon the question of the competency of the appeal, and the appeal committee determined that it was a proper point to bring before the attention of the House, and referred the question to the House to decide it as a guide for the future.[1]

LORD CHANCELLOR. — According to the course that we have adopted in other cases, if those costs can be separated from the costs of the appeal, they must be paid by the party who raised the objection of incompetency.

The Attorney-General. — That has always been when the objection has been raised in arguing the appeal before the House, but this was a point brought before the appeal committee, where it might have been decided.

LORD CHELMSFORD. — I was one of the appeal committee. We thought it was rather too difficult a point for us to decide with the assistance that we had in arguing it; we had not the benefit of counsel.

LORD CHANCELLOR. — Are there any additional costs that have been incurred in this case by the question of competency being argued at the bar here?

The Attorney-General. — Merely the attendance of the agent before the appeal committee.

THE LORD CHANCELLOR. — We shall follow the precedent of *Johnston* v. *Johnston*[2] which was decided a short time
*ago. There the appeal was dismissed with costs, except *20
the costs of the question of competency, as to which we ordered the respondent, the appeal having been deemed competent, to pay them to the appellant. In that case, as in this, there had been a reference by the appeal committee to this House.

[1] 7 H. L. Cas. 423. [2] 3 Macq. Scotch App. Cas. 619.

The following order was afterwards entered on the Journals: —

"It is ordered and adjudged by the Lords Spiritual and Temporal, in Parliament assembled, that the said petition and appeal be, and is hereby dismissed this House, and that the said orders and decretal order therein complained of, be, and the same are hereby affirmed: And it is farther ordered, that the said respondents do pay or cause to be paid to the said appellants the costs incurred by the said appellants in respect of the said question of the competency of the appeal, and that the said appellants do pay, or cause to be paid to the said respondents, the costs incurred by the said respondents in respect of the said appeal, except the costs incurred by them in respect of the said question of competency, and that the said costs so to be paid by the said respondents and appellants respectively shall be allowed as a set-off *pro tanto* to the costs to be paid to the said respondents and appellants respectively; and that the clerk of the Parliaments do certify the amount of such costs respectively, and the balance payable to the appellants or respondents, as the case may be."

Lords' Journals, 27th February, 1860.

IN COMMITTEE FOR PRIVILEGES.

THE BERKELEY PEERAGE.

1858. July 23. 1859. April 7, 15. August 11. 1860. June 18. July 12, 13, 20, 30. August 10. 1861. Feb. 26.

Peerage. Barony by Tenure. Evidence. Practice.

A claim of a barony by tenure was made by devisee (tenant for life) of the estate which was said to give the right to the peerage. A person who did not claim the estate was held to have no *locus standi* to be heard in opposition to the claim.

Assuming that, in fact, there existed in the reign of Hen. II. a barony of Berkeley, enjoyed by successive barons in respect of the possession of certain hereditaments, no legal right to be summoned to and sit in Parliament for such a barony can exist at the present day in any tenant for life or devisee of such hereditaments.

The 11th section of the 12 Car. II. c. 24, has not the effect of preserving such barony by tenure, if it ever existed.

The Committee for Privileges will in its discretion permit documents to be proved by printed minutes of proceedings before a former Committee on the same peerage, but as a rule will require the production of the original documents.

Semble, That where the nature of the peerage and not the pedigree of the claimant is in question, a plate erected in St. George's Chapel, Windsor, on the installation of a particular person as Knight of the Garter, is not admissible in evidence to prove the description given of him.

A report of the proceedings on another and different claim of peerage can only be referred to for the purposes of argument, but cannot be received as evidence.

VICE-ADMIRAL the Right Hon. Sir Frederick Maurice Fitzhardinge Berkeley, K. C. B., being, under the will of the last Earl Berkeley, seised as tenant for life of the Castle of Berkeley, and all the hereditaments constituting the Barony of Berkeley, presented his petition to the Crown, to be allowed, in virtue of the possession of such castle and barony, the dignity and honour of Baron of Berkeley, and to be summoned, as a Peer, to Parliament, in right of such dignity and honour.

The petition having been referred in the usual manner to the House of Lords, the claim was appointed for hearing * before * 22 a Committee for Privileges. The first sitting of the Committee took place on the 23d of July, 1858, LORD REDESDALE in the chair.

Mr. Fleming and *Mr. Macqueen* appeared as counsel for the claimant. *The Attorney-General (Sir F. Kelly)*, with whom was *Mr. Bentwick*, appeared for the Crown.

The Duke of Richmond, sitting in his place, was examined, and proved that the late Earl Fitzhardinge was never married.

Mr. Fleming then stated the case of the claimant. — The claim to this title is based upon prescription. The prescription alleged is this: that the claimant's predecessors, whose estate he now has, have, time out of mind, held the Castle and Barony of Berkeley in barony; and that, by reason of their seisin of the said castle and barony, they have been entitled to be, and have been, summoned to Parliament, and have had voice and place in Parliament as barons of the realm and Lords of Parliament. Unless this claim shall be declared contrary to law, extinguished by statute, or lost by non-user, it must be allowed.

The lands constituting the barony were held from the time of Henry I. by a family which took its name from them. For some reason, not clearly ascertained, Roger de Berkeley was dispossessed

be associated with certain of the judges for that purpose. Thomas Berkeley was one of the barons appointed. In the 15th year of the reign of that King, he was again appointed as one of the assistants to the judges to determine cases of difficulty, and received, as a baron, 20*s*. for his services, that being the sum assigned for payment to a baron, while a banneret had only one mark, a knight 6*s*. 6*d*., and a serjeant 5*s*. It will be proper here to notice a criminal proceeding against this Thomas. In the 3 Edw. 3 he was charged as having been privy to the murder of Edward II. He was tried in full Parliament, but by a jury of knights. The King, in the 11th year of his reign, releasing Thomas from all blame in that matter, expressly states, that he had been tried by "his peers." He was present as a Peer in Parliament in the 21 Edw. 3, and in all subsequent Parliaments held during his lifetime. In 22 Edw. 3 he obtained from the King a license to enfeoff certain persons in his castle, and in the lands constituting the barony, in order that they might make such a settlement of the estates as he directed. By a fine levied, the estates were * 26 settled on himself for life, * after his death on his son Maurice, and the heirs male of his body; and if Maurice should die without heirs male, then to the heirs male of the body of Thomas. [THE LORD CHANCELLOR. — To hold of the King by the same service by which the castle and barony had been previously held?] Yes. Notwithstanding this settlement, which made him only tenant for life, of these estates, he was summoned to, and sat in, every Parliament. Thomas died in the 35 Edw. 3; a grant of livery was made to his son, Maurice, who, in the 37 Edw. 3, was called on for payment of his relief, but pleaded the entail, alleging that his father was only tenant for life, and that the lands included therein constituted the Barony of Berkeley. The Attorney-General, on behalf of the Crown, took issue on this plea. [LORD ST. LEONARDS. — You say, that the fine and the conveyance under it passed the barony, as well as the estates?] Certainly, it being made by the license of the Crown. The finding affirmed this plea, except as to a small estate called the manor of Aure.[1] He sat in all the succeeding Parliaments during his life. He died in the 42 Edw. 3, leaving Thomas his son and heir, who did homage at the coronation of Richard II., and constantly sat in Parliament;

[1] Min. 1829, p. 35.

and, dying in the 5 Hen. 5, left an only daughter and heir, named Elizabeth, the wife of Richard Beauchamp, Earl of Warwick. She obtained, no doubt through the influence of the Earl, her husband, a grant of the custody of all the lands of her late father; and though a relative, named James de Berkeley, was the heir in tail male under the settlement, and obtained a grant of the lands, she, in reality, kept possession of them for some time afterwards. James must have obtained possession in the 9 Hen. 5, for he then paid his relief, and was summoned to Parliament. He appears not to have been summoned to Parliament till *then. *27 James died in the 3 Edw. 4, and was succeeded by William, who was summoned to Parliament as a baron until the 21 Edw. 4, when he was created a viscount, and in 1 Rich. 3 was made Earl of Nottingham. In the reign of Richard III., the Earl, by royal license, suffered a recovery of his estates. The recovery does not mention the barony, but the estates named are those which did constitute the Barony of Berkeley.[1] Having thus acquired the fee, he entered into an agreement with Henry VII. (by whom he was afterwards created Marquess of Berkeley), to settle the lands upon the King and his heirs male in case he (the Earl) should die without issue. This settlement was made by a fine, and the Earl dying without issue, the lands came into the actual seisin of the Crown, and so continued till the death of Edward VI. An inquisition, taken on the death of the Marquess,[2] found that his brother, Maurice, was his heir, but did not describe him as Lord Berkeley, and, in fact, he continued a commoner. He took part in many legal proceedings, in all of which he was described as "Maurice Berkeley, Esq.," which, as in the preceding case of James, showed, that when the lands were severed from the heirship, the heir who had not the lands was not treated as a Peer. The son of this Maurice, also himself a Maurice, was a commoner; but, at the coronation of Henry VIII., was made a Knight of the Bath, and in the 7 Hen. 8 served as Sheriff of Gloucestershire, by the title of "Sir Maurice Berkeley, Knight." In the 14th year of his reign, the King called a Parliament, and summoned Maurice to that Parliament as a Peer, but by a new creation. In the Minutes of 1829,[3] there is a letter written by the Lord Chief Baron and two other friends, addressed to this Maurice, who was then Gov-

[1] Min. 1829, p. 118.
[2] Min. p. 121.
[3] Min. p. 143.

*28 ernor of the * Castle of Calais, recommending him to "take this honour which the King's grace, by his writ, hath lately called you to, howbeit ye have not the room in the Parliament chamber that the Lords Berkeley have had of old time;" and they advise him not, at that time, to claim "the Lord Berkeley's room, for peradventure ye shall have more convenient time hereafter than now." He took the advice, and was introduced by proxy; he died not long afterwards without issue. Maurice was succeeded by his brother Thomas, who, in the 16 Hen. 8, was named in a commission to collect subsidies as "Thomas Berkeley, Knt." He was called to Parliament by summons on the 21 Hen. 8, and in the summonses for that Parliament, which are enrolled, he is called "Thomas Berkeley de Berkeley." He died 24 Hen. 8, and in the next year his son Thomas had livery of the estates which his father had held, but there is no writ of summons to him extant. It appears, however, from the Journals, that he sat in Parliament in January, 25 Hen. 8, and with the ancient precedency, for he was placed next to Lord Zouch, and before Lords Morley, Dacre, and others, whose ancestors had seats in the reign of Edward I. That must have been matter of favor, for he could make no claim to the barony vested in his predecessors, who were Lords of Berkeley in the 14th century, since he was not their heir, nor was he seised of the lands that they held. That he was in favor with the King is clear, for on the 24th November, 24 Hen. 8, he was made constable of Berkeley and warden of the Chases of Berkeley. He died two years afterwards, and had a posthumous son, named Henry. On the death of Edward VI., the male issue of Henry VII. failed, and Henry Berkeley, then under age and in ward to the Crown, became entitled under the ultimate remainder included in the fine levied by the Marquess, for he was the right heir of the Marquess. Proceedings by *Quo Titulo* were taken, and *29 his right was * established.[1] It was found that the lands were held of our lady the Queen (Mary) by the service of "one entire barony." Though Henry was then under age, livery was granted to him by special license from the Crown in 1 & 2 Philip and Mary, and he was called to Parliament by a writ of summons in the fourth and fifth years of their reign. He sat with a precedency (although not always exactly in the same place) wholly inconsistent with the date of the creation of James Lord

[1] Min. 1829, pp. 55–97.

Berkeley. He died 11 Jac. 1, and was succeeded by his infant grandson George. This George and his son George both sat in Parliament in the same precedency. In 1660, this question of precedency came before the House. Lord Berkeley petitioned to be placed before Lord De la Warr. The petitioner set forth his lineal descent from Robert Fitzhardinge, grandson to the King of Denmark, and claimed to have his "place in such sort as his ancestor Lord Berkeley, before that entail so made by the said Marquess, had and enjoyed." Lord De la Warr set up an order of the House, made in the reign of Elizabeth, which placed his ancestor between Lord Willoughby and Lord Berkeley, but this order was disallowed by the House. This question was therefore considered on its merits, and the idea that a claim to a barony by tenure, to this very barony, could not be substantiated, must be considered as absolutely negatived by that decision. As to the precedency itself, it is not very important, for in very early times it does not seem to have been strictly regarded. This George Lord Berkeley was sitting in this House when the 12 Car. 2, c. 24, the statute for abolishing knights' service and tenure *in capite*, was passed. The 11th section of that statute is, it is submitted, a distinct saving of feudal honours and of titles by virtue of tenure,[1] *and considering the circum- *30 stances, it is hardly possible to doubt that it was passed with reference to him and to the Lords Arundel and Abergavenny, who, like him, were sitting in Parliament under titles by tenure. In 1670, he renewed his claim for precedency. No decision was come to. In 1679, he was elevated to the dignity of Earl of Berkeley. The recital in the patent is important; it says,[2] after mentioning his high connections by affinity, that he is descended "from the illustrious and very ancient family of the Barons of Berkeley, whose progenitor, Maurice, son of Robert Fitzhardinge, sprung from the royal stock of the Danish kings, and a most distinguished champion in the conquest of England, married Alice, daughter of Roger Berkeley, Lord of Dursley, in the county afore-

[1] 12 Car. 2, c. 24, § 11. "Provided that neither this Act nor anything therein contained shall infringe or hurt any title of honour, feudal or other, by which any person hath or may have right to sit in the Lords House of Parliament, as to his or their title of honour or sitting in Parliament, and the privilege belonging to them as peers, this Act, or anything therein contained to the contrary, in any wise notwithstanding."

[2] Min. 1829, p. 265.

said, son of another Roger, son of William, nephew of Roger Lord of Berkeley, which Roger in the reign of William the Norman then flourished; and afterwards Maurice enjoyed the surname of Berkeley, from whose great nephew the same family has succeeded to the title and honor of Baron of Berkeley, down to the aforesaid George, for an uninterrupted series of about six hundred years, always brave, faithful, and pious." That patent alone would almost be sufficient to establish the title now submitted to the Committee. They were from time immemorial Barons, which must have been by tenure, because there were no Barons by writ six hundred years ago. The interruption while the Crown was in the possession of the castle is not sufficient to affect this statement. [THE LORD CHANCELLOR. — Yet it was an interruption for more than half a century. And the effect of that as a matter of law is to be *31 considered.] At all events the patent proves * that George derived under Robert, the grantee of Henry II. The Castle and Barony of Berkeley have from that time been vested in successive Earls of Berkeley down to 1810, and then under a devise contained in the will of the last Earl they vested in the late Lord Fitzhardinge, and they are now vested in the claimant.

James, eldest son of Charles, second Earl of Berkeley, was called to Parliament in his father's barony in 1704, and was put in the place of the ancient Barony of Berkeley, next to Lord Audley. [LORD ST. LEONARDS.—When did the widow of the devisor of 1810 die?] In 1845. [LORD ST. LEONARDS.—How was the barony disposed of during that time?] She had no interest in the castle and barony; she had only a small portion of the property, merely two farms, which were holden of one of the manors. The will created no separate estate; the manor was not severed, and the whole of it is now in the possession of the claimant. [LORD ST. LEONARDS. —There is a term of two thousand years in the will of the last Earl: what do you say of that term?] It must have been holden of the Lord; the reversion would be in him. The termor could not hold the title; the termor would hold under the person entitled to the reversion; there must be a freehold to give the title; the term is a mere chattel interest. The fee was in the reversioner. [LORD ST. LEONARDS.—Then the barony would be a barony by tenure after the term of two thousand years held by somebody else had expired?] No; the case must be viewed with reference to such estates as could have been in existence prior to the statute of Car. 2; now

before that statute the person holding the term would hold it of the reversioner. The statute of *Quia Emptores*, which prevented sub-infeudation did not prevent terms. [LORD ST. LEONARDS. — If the holding of the estate carries the right to the barony, and a term is created for two thousand years, the term carries the right of possession; the baron sitting here could be turned *out of pos- *32 session the next hour; the termor would be the owner in possession. He would have a chattel interest only, but that chattel interest would give him the entire possession and ownership of the castle during the two thousand years. Must the real enjoyment of the estates go with the title or not? Can a man be a Baron by the tenure of an estate in which he has not the slightest beneficial interest for two thousand years to come?] If possession is not taken under the term, the existence of the term will not prejudice the right of the person in possession. He has an estate independent of and superior to the termor. In former times termors were never supposed to interfere with the feudal possession. All persons who sat in this House, save the Earls, were, anciently, Barons by tenure. The Constitutions of Clarendon, Magna Charta, and the rolls of Parliament, all establish that fact. The Constitutions of Clarendon say,[1] "Archbishops, bishops, *and all *33 *personæ* of the realm who hold of the King in chief, may have their possessions of the King as a barony, and may thereof

[1] Article 11. That is the third article of the six *tolerated* by the Pope Alexander III., "not as good, but as less evil," than the rest. "Archiepiscopi, episcopi, et universæ personæ regni, qui de rege tenent in capite, habent possessiones suas de Domino rege sicut Baroniam, et inde respondent justiciariis et ministris Regis, et sequuntur et faciunt omnes rectitudines et consuetudines Regias et sicut barones cæteri debent interesse judiciis curiæ Domini Regis, cum baronibus, usque perveniatur in judicio ad diminutionem membrorum, vel ad mortem." (1 Rep. Dig. Peer. 44.) This article is not expressed in the same terms in all the books which quote it. In some of them most of the verbs which appear here in the indicative, are given in the subjunctive mood. Selden remarks on the difference, and it was adverted to in the argument. The contractions in the copy (Cott. MSS. Vitellius E. xi.) rather favour the indicative, and perhaps that was the style in which the article was sent to the Pope. But he may have returned the words altered to the subjunctive as more clearly indicating his permissive, yet reluctant, recognition of the article. The Constitutions originally consisted of sixteen articles; ten of these were formally condemned by Pope Alexander III., in full Consistory, as hostile to the rights of the clergy. The other six (2d, 6th, 11th, 13th, 14th and 16th,) he tolerated, not as good, but as less evil than the rest. (Reeves' Hist. Eng. Law, vol. i., p. 75.)

answer to the justices and ministers of the King, and may observe and keep all royal rights and customs, and even as other barons ought to be present at the judgments of the King's court with the Barons, until it shall come to the loss of limb or to death." The spiritual peers always left the House when questions as to corporal punishments arose. Selden, remarking on this passage, says:[1] "It is a singular testimony for what we have before delivered concerning the creation of barons in those times. *Tenere de Rege in capite, habere possessiones sicut Baroniam*, and to be a Baron, and to have right to sit with the rest of the barons in councils or courts of judgment, according to the laws of that time, are synonymies in it." Again, Selden dividing the history of the creation of Parliamentary barons since the Normans into three parts, says:[2] "All honorary barons of the time whereof we now speak, were (for aught appears) barons only by tenure, and created by the King's gift or charter, of good possessions (without the title of Earl), whereby he reserved to himself a tenure in chief, by common knight's service, or by grand serjeantry, or by both." The clause in Magna Charta, as to the mode of summoning the great barons, is conclusive on the subject, and there are several entries in the rolls of Parliament concerning barons, who came by summons, and held by barony throughout the reign of Edward I. Coke upon Littleton[3] speaks of three species of barons: by writ, by prescription, and by tenure. Those by prescription can be no other than the feudal barons. He does not speak of the creation of barons by tenure, because they could not be created after *34 the statute *Quia Emptores*, for *they would have had knights holding under them; and by that statute sub-infeudation was destroyed. Lord Hale, in his note to Coke upon Littleton, in the edition of 1788 (15 b), speaking of the case of Lord Grey, of Ruthyn, expressly recognizes the title of Berkeley as one held by tenure. He says, "But if it were a feudal title of honour, as of the Earldom of Arundel, or Barony of Berkeley, there *possessio fratris* should hold well, because the title is annexed to the land. So of an office of dignity; and, *eâ ratione*, the office of High Chamberlain of England descended to the Earl of Linsey, of the whole blood, and departed from the line male of the Earl of Oxford, and adjudged accordingly in Parliament." In the case of *The King* v.

[1] Tit. of Hon., c. 5, § 20, p. 704, 2d ed. 1621.
[2] Tit. of Hon., c. 5, § 17, p. 690, ed. 1621. [3] 16 a.

Knollys,[1] Lord Holt, speaking of the dignity of peers, says: "As to the first, before King Edward III., there were but two titles of nobility, viz., earls and barons. Barons were originally created by tenure, afterwards by writ." If barons were originally barons by tenure, and as such formed part of the Parliament, then the right, where the tenure has been clothed with the possession of the dignity, cannot be lost, unless taken away by statute. The statute, 5 Rich. 2, says, that the barons shall be summoned to this House. By that statute it is enacted that "all and singular person and commonalties, which from henceforth shall have summons to Parliament, shall come from henceforth to the Parliaments in manner as they are bound, and hath been accustomed within the realm of England of old times. And whatever person of the same realm who henceforth shall have summons, be he archbishop, bishop, abbot, prior, duke, earl, baron, banneret, knight of the shire, citizen of the city, burgess of borough, or other singular person or commonalty whatever, doth absent himself," shall be fined. The right, therefore, of those who had *hitherto come was *35 preserved. The Barons of Berkeley had been called to Parliament by reason of their tenure, had sat, and they were entitled to be called to Parliament under that statute. The statute of Car. 2 expressly saves the right. That statute must be taken as a Parliamentary recognition of the title. In Lord Berkeley's case, that right, even as to precedency, was insisted on in the year when that statute was passed, a statute which in terms saves feudal titles, of which, as barons by tenure, they were possessed. This is a claim to a feudal title in respect of an entire barony, which is now in the possession of the claimant, and which, it is confidently submitted, gives him a right to a seat in this House as a Baron by tenure.

1859. April 7, 15; August, 11. 1860. June 13.

A petition from the Hon. G. C. Grantley Fitzhardinge Berkeley was read in opposition to the claim.

THE LORD CHANCELLOR (LORD CHELMSFORD).—I do not understand that the petitioner seeks to be heard by counsel; but even if so, he has not shown a *locus standi*, for he does not set up any

[1] 1 Ld. Raym. 12.

claim to the castle, and it is in respect of the possession of the castle, that the claim of peerage is now made.

Counsel were called in.

The charter from Henry Duke of Normandy to Robert Fitzhardinge was produced and read. It granted "Berkeley and Berkeley Hernesse the manor, with all its appendages" by the service of one knight, but no mention was made of the castle nor the barony. The charter from Henry II. was produced. It was a grant of the same manor, with all its appendages, "fully and entirely as it was in the time of King Henry, my grandfather, to hold in fee and inheritance to him and his heirs of me and my heirs by the service *36 of five knights." There was no additional *property granted; neither "castle" nor "barony" was mentioned, and there were no words importing confirmation of the first grant.

The charter of Queen Eleanor was produced. It was indistinct in some parts, but the words "*suis tenenda in baronia*" appeared distinctly, and so did the words "*sicut carte domini mei regis*," and "*Regis Ricardi filii mei testantur*." The words "*Quas ipse Mauricius habet et sicut carte eorumdem regum quas fratres sui habent testantur*" were also fully legible.

A great many entries of fines paid for the lands were put in and read. The amount of these fines proved, it was alleged, that the holder of the lands was a baron.

The charter of Richard I. was produced. There was no word of "barony" or "castle" in it.

Many documents, public and private, were given in evidence, to show that the lands in question were constantly denominated "the Barony of Berkeley."

Many enrolments of writs of summons to Parliament, in which the name of Berkeley appeared, were also put in, and a great mass of evidence was given in support of the opening statement.

Mr. Fleming stated that some of the documents now put in had been produced in 1829, and were to be found in the minutes of the proceedings then taken. He submitted that he might refer to such documents as already in evidence. That was done in the Beaumont case.[1]

The Committee would permit that to be done on some occasions when it was convenient, and it was done for that reason in the

[1] 6 Clark & F. 868.

Beaumont case, but whenever it was necessary, it must be understood that the original documents must be produced.

A tracing of the arms and inscription on a plate erected *in *37 St. George's Chapel, Windsor, for James, Earl of Berkeley, on his installation as a Knight of the Garter, on 30th April, 1718, was tendered in evidence, but objected to.

Mr. Fleming. — Such a piece of evidence was admitted in the Shrewsbury case.[1] It is offered to prove the style by which he was described on his election as a Knight of the Garter.

The Committee thought that it was not admissible. In the Shrewsbury case it was admitted as a proof in a pedigree, to identify a particular person.

The evidence was withdrawn, to be reproduced, and its admissibility argued, if necessary.

Mr. Fleming proposed to put in evidence the *Abergavenny Case* as already printed.

LORD REDESDALE (the Chairman). — Do you mean that in the *Abergavenny Case* this House decided that there was a barony by tenure, and do you desire to put that in evidence? It ought to be proved from the Journals.

Mr. Fleming. — Certainly.

LORD ST. LEONARDS. — It may be used in argument as a precedent.

LORD CRANWORTH. — And it may be printed as part of the claimant's case.

Mr. Fleming. — In the *Montrose Case*[2] evidence of this kind was received. Sufficient does not appear on the Journals. The statements in them might lead the Committee into error.

The Committee rejected the proposed evidence. The Journals might be produced, and books of authority might be referred to in argument, and the report printed as a part of the claimant's case, but it could not be received in evidence.

1860. July 12, 13, 20, 30.

* *The Attorney-General* (*Sir R. Bethell*) and *Mr. Bentinck* appeared for the Crown. *38

Mr. Fleming (with whom was *Mr. Macqueen*) summed up on behalf of the claimant: —

[1] F. H. L. Cas. 10.

[2] Report published by Lord Lindsay, App. 407 (London: Murray, 1855).

The facts of this case are very simple. The doubts now raised as to the nature of the peerage will be found to be unwarranted. A mistaken opinion had existed that the ancient charters, which created baronies by tenure, expressed a grant of baronial tenure. There is no instance of such a grant. The original charters creating territorial baronies in England are very rarely found. But many such grants had been made in Ireland by King John, and were preserved; and as the laws of the two countries were similar, they afford evidence of the form in which the English charters must have been granted. A grant creating a baronial tenure was a grant of land with criminal and civil jurisdiction. This was the form of the grant by Henry I. to Robert Fitzhardinge,[1] though not in terms creating a barony by tenure. In the Irish Close Roll, 51 Edw. 3, is an entry of a complaint by Walter L'Enfaunt, Knt.,[2] who had been "amerced as a tenant by barony, by reason that he came not to our Parliament, as by our writ he was summoned." It recites the proceedings, and goes on thus: "It is not the law or custom hitherto used in our said land that any persons who have not holden by barony ought to be summoned to our Parliament, or to be amerced by reason of their absence therefrom." The charter to Robert Fitzhardinge, being one by which he did hold by barony, must therefore have created a tenure in barony.

* 39 * The possessions of Berkeley were, in returns made to the Crown, called "The Honor of Berkeley." Now "honor" was synonymous with "barony."[3] And they are so treated in King John's Magna Charta.[4] The payments made by different barons of this family, as their reliefs, show that they were so considered in their case. And the trial of Robert de Berkeley by his Peers on his amercement, of two thousand marks, proves the same thing. These facts, and the continuous succession, establish the presumption on which this claim is founded. In the 22 Edw. 3 there was a license from the Crown,[5] to settle the lands constituting the Barony of Berkeley. Under that license, Thomas de Berkeley settled those lands[6] upon himself, for life, with remainder to Maurice, his son, in tail male, with remainder to the heirs male of his own body, by Catherine his wife, with remainder to his own

[1] Evidence (in this case), pp. 7, 8.
[2] 3 Appendix to Sir Maurice Berkeley's Case, p. 100. See also p. 95.
[3] Spelman, *voce* Honor.
[4] Ch. 51.
[5] Evidence, 79.
[6] Evidence, 205.

right heirs. There was a power in the Crown to grant such a license, and, being granted, a settlement might be made of the barony; a transfer of it by the act of the individual. He might alienate the barony, and the dignity followed the barony. That is precisely the case of Lucy, of Cockermouth. In the 7 Rich. 2, the King granted a license[1] to Henry, first Earl of Northumberland, and Maud de Lucy, then his wife, to settle the castle and honor of Cockermouth, and various other hereditaments, her inheritance, upon themselves and the heirs male of their bodies, and in default of such issue, upon Henry Percy, the eldest son of the Earl by his former wife, in tail male, with divers remainders over, and subject to a condition that every person taking under the entail should quarter the arms of
*Lucy. The Earls of Northumberland have, in virtue of that *40
settlement, ever since borne the title of Lord Lucy.

The Crown then had power to grant such a license. In the *Berkeley Case* the Crown did grant it. The castle and manor were then granted to three persons: for Thomas, the then baron, for life, remainder to his son Maurice in tail male, remainder to the heirs male of the body of Thomas and Catherine his wife; remainder to the right heirs of Thomas. This Thomas, though only having an estate for life, was constantly summoned to Parliament. Maurice succeeded his father in the 35 Edw. 3, and proceedings were taken against him for the payment of his relief, to which he pleaded that he took an estate directly under the fine, and did not claim by inheritance. This was proved, and he was held not liable to pay the relief due on inheritance. He was summoned to Parliament in the 36 & 42 Edw. 3. In the latter year he died, leaving a son, Thomas, then thirteen years of age, who, in the 48 Edw. 3, did homage, and obtained seisin. He attended the coronation of Richard II., and was summoned to Parliament in the 5 Rich. 2. On the deposition of that King, he was elected by the barons and bannerets to announce to the King, then in the Tower, his deprivation of the throne. These facts show that the Berkeleys continuously sat as barons of the realm, and they only held that dignity by the tenure of the barony.

There are also circumstances which show that it was not held as a personal honor. On the death of Thomas, it did not devolve on his daughter, which it would have done had it been a mere

[1] Supp. Case, 20 n. Q.

barony by writ. The inquisition on the death of Thomas found that Elizabeth was his daughter and heir, and that she was married to the Earl of Warwick. James Berkeley was the heir male of Thomas; he did not obtain seisin till the 9 Hen. 5, and then, *41 having *completed his legal title to the barony of Berkeley, he was called to Parliament. The writ to him issued in consequence of his seisin of the barony. He had no title, except under the fine. There were only three earls and eleven other barons summoned to that Parliament, and every one of them had before sat in Parliament. James Berkeley was the only one who had not so sat; and the Parliament being summoned by the Duke of Bedford, as Regent, and no Regent being able to create a Peer, he must have been summoned in virtue of a previously existing peerage, and the only peerage in virtue of which he could have been summoned, was the peerage by tenure. [LORD BROUGHAM.—You assume that the *Custos Regni* had no power to create peers. That was much questioned in the debate in 1789 and in 1811; and a restriction being at first imposed on the Regent, that restriction was afterwards removed, thus assuming that the Regent had the right but for the restriction.] The writ was tested by the Duke of Bedford solely as Regent. [LORD WENSLEYDALE.—As the act of the King in Council: *Per ipsum Regem et Concilium.*] It was so. The resolution to call the Parliament was no doubt the act of the King in Council, but the writs were tested by the Regent. But the Regent could not make a Peer. In no instance was a writ of summons directed to a Baron of Berkeley till he had obtained seisin of the estates. In the 12 Edw. 4, William Berkeley obtained a confirmation by that King of the previous confirmation by Edward III., of the charters of Henry II., Richard, and John, which confirmation was made not to him and his heirs simply, but to "the said William Berkeley, Knt., Lord of Berkeley, and his heirs, Lords of Berkeley," an expression which shows that the grant was not to the heirs, as heirs alone, but also as the Lords of Berkeley. [THE LORD CHANCELLOR.—As in the Act of Settlement of the Crown to "the *42 *Princess Sophia, and the heirs of her body, being Protestants."] Precisely so. And that constitutes what Blackstone calls a base or qualified fee. Then came the settlement made in the 3 Hen. 7 (also made under a royal license)[1] by which feoffees

[1] Evidence, 137.

were created to make an estate to William and the heirs of his body, to hold of the King by the services accustomed, remainder on the death of the Earl (he had not then been made a Marquess, but was so shortly afterwards), without heirs of his body, to the King and the heirs male of his body. Under this remainder, the castle and barony went to the King, and Maurice, the brother and heir-at-law of the Marquess, who must have succeeded had it been a personal dignity, was a commoner. [LORD REDESDALE. — Was the remainder to the King something given in order to save the forfeiture incurred by the common recovery suffered by the Earl of Nottingham in 2 Rich. 3 ?] If any forfeiture was then incurred, which need not now be discussed, it was not acted on, for the Earl was allowed to hold the estate without interruption for many years after the recovery. Maurice was created a Peer by writ of summons to Parliament in 14 Hen. 8 ; he was at the time Governor of Calais. Lord Mountjoy appeared for him, and he had then only the precedency of a junior baron. The letters[1] advising him to accept that rank, and to postpone till a "more convenient time" his demand for the room of the ancient Barons of Berkeley, show exactly what was his position at that time. On the failure of male heirs of the body of Henry VII., that is, at the death of Edward VI., the then Lord Berkeley was a minor ; he was cousin and heir to the Marquess, and a question arose, "whether the manor should be in ward to the Queen by reason that the seigniory * was * 43 suspended in Edward VI., at his death, &c. And at last it was resolved by all the Judges, that the Queen should have the ward, not by her prerogative, because other lands were holden *in capite*, but by reason of the tenure which is revived, by the death of the last King, in the person of the Queen, and ought to have escheated to her for want of heirs of the said Marquess."[2] There is, therefore, this judicial decision on the tenure in addition to the proceedings in *Quo Titulo* before referred to.[3] The matter was again considered by the Court of Common Pleas on a claim to a portion of the hereditaments, constituting the barony, made by one Willion, under a grant of Edward VI. It was then again held,[4] that the tenure had revived, and Henry Berkeley thus became possessed of the territorial barony. He became of age in November, 1556, and in the following January took his seat in the old

[1] Min. 1829, p. 143. See ante, p. 27.
[2] Lord Barkley's Case, Dyer, 102 *a*.
[3] Min. 1829, pp. 55–97.
[4] Plowd. 222.

precedency, first above Lord Morley, and then above Lord Zouch, and finally next to Lord Audley. Then came the contest for precedence between him and Lord De la Warr, which terminated without a decision, because of his being made an Earl, but in the course of which his right to sit in virtue of the old barony was distinctly recognized.

In Scotland, such a dignity is well known. In the Report made by the Lords of Session pursuant to Order of this House, 27th February, 1740, they state, that they can find no patents of peerage earlier than the reign of James VI., and "before that time titles of honor and dignity were created by erecting lands into earldoms and lordships."[1] Glanville[2] and Bracton[3] use expressions
* 44 which show * that, in their opinion, earldoms and baronies depended on the tenure of land, the *caput* of an earldom or barony.

There are four objections made in the present inquiry to the existence of a barony by tenure: First, the omissions from the charters of the kings confirming Magna Charta of the provision directing the great barons to be summoned by special writ. There is nothing in that objection, for the usage has been so to summon them from Magna Charta to the present day. The second is, the alteration in the writs of summons of the word "homage" to "allegiance." The third is, that the existence of personal honours is inconsistent with the maintenance of territorial honours; and, lastly, that the alteration in the tenure of land has destroyed the right, even if it had previously existed. [LORD BROUGHAM mentioned an old MS. which he had seen at Holkham, at first thought to be Lord Coke's, but afterwards believed to be written by Mr. Justice Doderidge, in which this limitation was put on barony by tenure: that a conveyance or transfer of a barony by tenure must be confined to the relations of the blood of the first grantee.[4]]

As to the first objection, every person holding an entire barony was entitled to receive a writ of summons to Parliament; and that title was insisted upon and was acted on. In Matthew Paris[5] is the statement of what occurred in the 39 Hen. 3, when the King having urgently demanded an aid from the Peers then present in Parliament, the answer was, that all of the Barons this time not

[1] 3 Append. Berk. Cas. p. 108. [2] Bk. 9, cc. 4–6. [3] Bk. 2, c. 16.
[4] It did not appear whether this MS. was ever published.
[5] Hist. Angl. 639, 640, ed. Lond. 1640.

having been called to Parliament, the Peers there were not, in their absence, willing to grant the aid required; and the assembly broke up without proceeding to business. And the usage has always been to send special writs to all the Peers.

*As to the second objection, the words in the writs have *45 often been changed. In the 49 Hen. 3, they were on the "faith and love;" so they continued till the 27 Edw. 1, when two Parliaments were summoned in the same year. In the summonses for the first, the words were "faith and homage;" for the second, they were "faith and love;" and these forms were indiscriminately used until the 22 Edw. 3, when the word "allegiance" was first introduced, and the phrase ran, "faith and allegiance." This form, however, was not constantly observed until the reign of Richard II., from which time it had been universally observed. There is nothing, therefore, in that objection, and more especially since every man who held *in capite*, whether an entire barony or the smallest portion on a knight's fee, was bound to do homage; and such, notwithstanding the statute 12 Car. 2, c. 24, is still the rule at the present day.

The third objection is, that the introduction of personal honours, baronies by writ, which first occurred, as Spelman and Selden think, in the early years of Henry III., was inconsistent with baronies by tenure. Fleta[1] describes the King's council in his Parliaments as consisting of "Prelates, Earls, Barons, *Proceres*, and those skilled in the law." There is little doubt that the word *Proceres* here designates the Peers who were not Barons by tenure. The baronies by writ could not have destroyed the baronies by tenure, for otherwise the Parliament would have become a mere council, existing at the pleasure of the sovereign. The Barons by tenure made grants in Parliament for themselves and their tenants, as distinguished from other grants made generally by Parliament. In the Parliament roll of the 13 Edw. 3,[2] there is an entry which shows that the Commons offered an aid to the king, upon certain conditions.* On the same day the Earls and Barons *46 present granted for themselves "*et pur leur Piers de la terre q teignent par Baronie*," the tenth, &c. That would not extend to any members of this House who did not hold by barony. [LORD CRANWORTH.—Did the magistrates and *Proceres* who were not,

[1] Bk. 2, c. 2.

[2] Rot. Parl. vol. 2, p. 107,

according to your theory, Barons, make a separate grant for themselves?] No, they are included in the general grant; that first made. The House of Lords did not grant a separate subsidy, except in respect of the tenants of the Barons who represented their tenants as well as themselves. [LORD CRANWORTH.—If the Commons only granted for themselves, and the Earls and Barons who held by barony for themselves, then those who sat as Barons by writs of summons would seem not to have been assessed at all.] It is difficult to say how that was; they could not be liable to this assessment, which is confined to Peers who hold by barony. [LORD CRANWORTH. — That would seem to show that "Barons" included all who sat in the House of Peers as Barons.] The inquisitions of the time show that most of the members of this House in the 13 Edw. 3, did not hold *per Baroniam*. The members of this House who held by barony claimed an exemption for their tenants which was not enjoyed by those who did not so hold. This was an exemption from payment of wages to the knights of the shire. There was a demand in the 28 Edw. 3 to have this question of exemption settled, and the King answered, "that that shall be done which hath hitherto been done." The distinction disappeared by degrees, but at one time it existed in full force.

It was said, that all who held by barony were not summoned to Parliament, and that therefore the Crown must have had the power of selection. If so, the House was a body wholly dependent upon the will of the King. [LORD BROUGHAM. — Suppose the holder
* 47 of a barony lost it, would * he lose his right to sit in Parliament?] It would be entirely in the power of the Crown to determine his peerage at that moment. The Crown might or might not issue a writ of summons to him. If issued, he becomes a Peer solely by writ. [THE LORD CHANCELLOR. — Suppose he aliened the barony. LORD WENSLEYDALE. — Could the alienee demand a writ of summons as a matter of right?] Of course the claimant is bound to maintain that proposition. [LORD REDESDALE. — If part of the barony was alienated, would the right to sit for that barony cease?] That would depend on circumstances. If aliened with the license of the Sovereign, the peerage would continue. In *Lord Fitzwalter's Case* there was a license on the express provision, that the alienation should be without prejudice to his barony. It was essential that he should have an entire barony, and that the barony should have originated in a grant from

the Crown. The Lords Palatine created their chief tenants "Barons," but those persons never could sit in this House. They were Barons of the palatinate, but not of the kingdom. And then the holder must have the entire barony, otherwise, as in the case of *Cornewall* of Burford,[1] he could not claim to sit as a Peer.

Not only were there baronies, but there were earldoms by tenure. The Earldom of Arundel is one instance, the Earldom of Lancaster another. In neither case was there one word in the charter regarding dignity or title. The castle and honour of Arundel were held *per Baroniam*, and it was expressly found that the title they conferred was that of "Earl," an Earl being a Baron as much as any other member of this House.

The Bishops of the ancient sees hold their seats here by tenure. They taxed themselves in the 13 Edw. 3, one * ninth * 48 in respect of their baronies, one-tenth being paid by those "not accustomed to be summoned to Parliament." And in the 1 Edw. 1 is a writ from the King, commanding the Sheriff of Sussex to take into his hands "the barony belonging to the Bishopric of Chichester." In the 21 Edw. 1, when the Archbishop of York had excommunicated the Bishop of Durham, the matter was brought before Parliament, and the existence of the bishop's "temporal barony" was expressly declared. So the abbots in ancient houses had seats in this House in virtue of their temporal baronies; and Lord Coke[2] says, "if the King called an Abbot, Prior, or other regular prelate by writ to the Parliament, if he held not of the King *per Baroniam* he might refuse to serve." And this rule of law was, in some instances, acted on. The *Abbot of Beaulieu's Case*[3] was one, but not the only instance of the kind. In like manner the Prior of St. John of Jerusalem sat in Parliament until the dissolution of the monasteries, solely by virtue of his territorial possessions.

Now, as to the fourth point, the alterations in the tenure of land. The proposition contended for now is, that every grant of a territorial barony was a grant to a man, "his heirs and successors." At the period of the Berkeley grant, "heirs and successors" were synonymous terms. Lord Coke says:[4] "At this time *hæredes* was taken for *successores*, and *successores* for *hæredes;*" and again,[5]

[1] Claimant's Suppl. Cas. 43 n. C. C. [2] 4 Inst. 44.
[3] Memoranda Roll, 15 Edw. 4, Trin. T., M. 13 D.
[4] 2 Inst. c. 1, p. 5, n. 9. [5] 2 Inst. c. 2, p. 7, n. 6.

"in ancient times *successores* was synonymous with *hæredes;*" and in *Willion* v. *Berkeley*[1] it is laid down, that the word heirs is applied to the Sovereign, and that the King and his heirs includes successors. From the Conquest downwards alienation by
* 49 license of the Crown has *been lawful; without license it was unlawful.[2] The 1 Edw. 3, c. 12, did not make forfeiture but only a fine the consequence of alienation without license; and so it is explained by Lord Coke in *Cromwel's Case.*[3] The statute of Car. 2 took away the fine for alienation.

Assuming, then, that there might lawfully be an alienation, the *Kingston Lisle Case*, spoken of by Lord Coke,[4] and by Blackstone,[5] shows that an assignable peerage may be granted, and may be assigned, and that the assignee may sit in Parliament. In the Scotch law, this was distinctly recognized in the Roxburgh, Queensbury, and Kinghorn cases.

But it has been said, that the gravest inconveniences and the most ridiculous absurdities may arise from barony by tenure; that an assignee of an insolvent, or of a bankrupt, or a mortgagee in possession, might claim a seat. [LORD BROUGHAM. — Or a provisional assignee, because he takes by assignment.] If such objections existed, they would show inconveniences to be connected with it, but would not show that such a peerage could not be created. But they do not exist. It is only a person who has an estate of freehold in the tenure that could claim the seat. There is no instance of a person having only an interest of a temporary or unfixed character in the lands being allowed to hold the dignity. It must also be a full and complete title; a mere legal, severed from the equitable or beneficial, title would not be sufficient; for the difference between legal and equitable estates was not known at this early period. A trustee could have no claim, and to suppose that the assignee of an insolvent or bankrupt should become the owner of the barony of Berkeley, is to suppose an improbability almost too great to require consideration.

* 50 *Then it is said, that this is an interest which may determine at any moment. But so may the title to the Crown itself; as, for example, by the Sovereign conforming to the Roman Catholic Church. And, in the other House of Parliament, a member ceases

[1] Plowd. 222, 249.
[2] 1 Inst. 43 *b*, quoting Bracton.
[3] 2 Rep. 69, 80.
[4] 1 Inst. 27 *a*.
[5] 2 Bl. Com. 109.

to be a member after certain proceedings taken against him in bankruptcy.

Then, it is said, that dignities by tenure have ceased to exist. Where is the proof of that? If they existed at one time, what has put an end to them? There is no decision of this House having that effect. Lord Coke has recognized them.[1] So has Selden.[2] Sir Matthew Hale[3] also recognized the legality of territorial dignities. So Lord Chief Baron Comyn[4] says, "a Baron was originally created by tenure, and afterwards by writ or patent." And again,[5] "So he may be a Baron by tenure; and such barony goes with the land to the heir male, or otherwise as the land is limited."

The proceedings in Parliament, in the 8 Jac. 1, on the question of the abolition of the military tenures, confirms the existence of barony by tenure (Lords' Journals,[6] where "the tenure *per Baroniam*, as it may concern Bishops or Barons, or men in Parliament," is made the subject of discussion). The 12 Car. 2, c. 24, § 11, expressly preserves any "title of Honor Feodal." To such feudal honours, as were created and existed in this case, must that section be taken to refer. [The LORD CHANCELLOR. — But that would not show that the possessor for the time being had the right to aliene the honour to a stranger.] That was a necessary consequence of the * dignity by tenure. The grant made by Henry II. to * 51 Robert Fitzhardinge was a grant "to hold in fee and inheritance to him and his heirs of me and my heirs." In 23 Edw. 3, there was an alienation to feoffees, and an entail by them. That entail altered the rights of the parties. There is no authority in the law of England to distinguish between an heir male claiming an inheritance granted in fee, and any other person. Estates tail are solely by virtue of the statute *De Donis*, and a feudal honour is within that statute, and so was not forfeited by an attainder for felony: Lord Chief Baron Parker's opinion in the *Ferrers Case*.[7] [The LORD CHANCELLOR. — That must be held to be a good decision in that case; but there is high authority to show that it was out of tenderness that the forfeiture there was waived.] There is only

[1] 1 Inst. 16 *b*, 6 Rep. 74 *a*.

[2] Tit. Hon. c. 5, § 27.

[3] Harg. & B.'s note, 1 Inst. 15 *b*, n. 3, quoting "H. 16 Car. Cro. n. 4." A discussion ensued as to the probable date of this manuscript of Hale, and it was stated that the edit. of Cro. Car. with the cases numbered, was first published in 1669, so that this note must have been subsequent to that date.

[4] Dig. tit. Dignity, B. 6.

[5] Id. C. 2.

[6] 29 March, 1610.

[7] 2 Eden, 373, 380.

of Queen Mary it was found that the barony of Berkeley was held as an entire barony, and livery followed upon that finding, and the writ of summons followed upon that. Nay, at the very moment when the *Fitzwalter Case* was before the Privy Council, there was pending in this House the contest between Lords Berkeley and De la Warr as to precedence, Lord Berkeley grounding his claim upon his territorial title. And afterwards, when Lord Fitzwalter took his seat in this House, and claimed precedence as a Baron of the reign of Edward I., the House went through the whole of the case as if there had never been any decision of the Privy Council, and compelled him to prove his title. He did
* 57 prove it, and he * was then placed as a junior Baron of the reign of Edward I. And recently, when Sir Brook Bridges claimed the barony of Fitzwalter, and Sir Harris Nicolas proposed to give the proceedings in the Privy Council in evidence,[1] the Lords asked whether there was any precedent for receiving proceedings before the Privy Council on claims before this House, as proceedings before former Committees for Privileges. "The counsel were informed that the proceedings might be received *de bene esse;*" and it was said that "if on consideration it should appear to be necessary, their admissibility in evidence might be argued at the bar." And, in fact, the whole case was proved without reference to the Report of the Privy Council.

On these grounds it is submitted that a barony by tenure did exist, and does continue to exist. No statute has extinguished such a barony; the 11th section of the Act of Charles II. expressly saves it, and in the case of this claimant there are united all the legal requisites to entitle him to make good his claim.

THE LORD CHANCELLOR. — The case of the claimant has been most fully, learnedly, and zealously argued by the learned counsel. We must now adjourn the case for the observations of the Attorney-General on the part of the Crown.

The Attorney-General (Sir R. Bethell; Mr. Bentinck was with him) for the Crown. — This claim is, in the first place, inconsistent with the idea of nobility; secondly, inconsistent with the settled principles of our constitutional system; thirdly, inconsistent with the prerogative of the Crown; and lastly, inconsistent with the present condition of the laws of real property.

[1] 10 Clark & F. 951.

As to the first, a peer of the realm is ennobled in blood, *and that nobility, conferred upon him by the creation of *58 the dignity, descends to his heirs. It is a personal dignity, to which are incident great personal powers, privileges, and duties. A peer cannot aliene, nor surrender, nor, except by crime, affect the transmission of his dignity. A peerage, therefore, which is claimed as incidental to the enjoyment of an estate, the title to which may fluctuate from time to time, and be transmissible to various persons, is inconsistent with the idea of hereditary nobility itself.

It is inconsistent with the settled constitution of this House. The right to be a Lord of Parliament is ascertained by the records of this House, by its traditions, usages, and precedents, and when these are examined they will show no other foundation for a title to a seat in this House, than is derived from creation by writ or patent of the Crown. The records, within four centuries at least, show no instance of an individual sitting in this House under any other right.

Thirdly, this claim is inconsistent with the settled opinion entertained of the prerogative of the Crown. The Crown is the fountain of honours. One of its prerogatives is the right to that *delectus personarum* on whom the privilege of nobility shall be cast. But the principle of this claim is that peers are to be created at the will of private persons, thereby becoming *de jure* entitled to the Crown's writ, to come and sit in this House. There is no document which warrants, there is no writer who has given countenance to the assertion of, such a doctrine.

Lastly, it is impossible to reconcile this claim with the present condition of the law of real property. If any thing like a legal definition or character is given to it, it must be denominated a prescription in a *que* estate. But if so, if inseparably incident to a particular estate, it must follow all the devolutions, all the modes of settlement, and *all the modes of enjoyment to *59 which that estate is subject. Then does it belong to the bare possession of the castle? or to the ownership of the castle without the possession? Is it consistent with the alienation of a part, and if of a part, then of how much of an estate? [THE LORD CHANCELLOR. — The claimant says it must be in respect of the entirety of the barony.] There are insuperable difficulties in that way of presenting the claim. But it will be better to postpone, for the present, considering that view of the matter.

There is an admission made in the supplemental case of the claimant,[1] that at the time of passing the statute, 12 Car. 2, c. 24, for abolishing tenures *in capite*, the Earl of Arundel, and Lords Abergavenny and Berkeley, "were the only peers who then sat, or, so far as can be ascertained, who could then claim to sit in Parliament under a feudal title of honour." That is a very suggestive admission. What is meant by a tenancy *per Baroniam?* It is assumed, but no authority is shown for the assumption, that it was the seisin and possession of an estate that entitled the possessor to be regarded as one of the *Barones Majores* of the kingdom. The loose expressions of Bracton and Glanville do not justify this; they often import into the English language classical words, wholly inapplicable, except by mere analogy, to English rights or property. If an English tenure *per Baroniam* was to be found with any definite rights or incidents attached thereto, every one would expect that it would have been carefully described by Littleton. He does not in the smallest degree make any distinguishing notice of this tenure, though, if the argument of the claimant is well founded, it was at once the most important and illustrious of the tenures of
* 60 the land, since it not only gave the * right of sitting in the Legislature in the realm, but enabled a subject, by aliening his property with the license of the Crown, to make a Lord of Parliament. In foreign, but not in English jurists, something of this sort is spoken of; but, even there, it is doubtful if the possession of the land did more than confer a mere title, not a Legislative rank; and certainly, according to Cruise,[2] after the Ordonnance of Blois, in 1579, Art. 258, "the acquisition of a fief noble did not confer nobility." But then, it is said, that there is a recognition of this right in Magna Charta. This is a mistake, which has originated in confounding the feudal with the political relation of a tenant *in capite* to the Crown. No doubt the Sovereign did confer estates, the condition of the holding of which was, to render a certain amount of military service to him. The phrase *per Baroniam* was nothing more than a condensed expression of the number of Knights' fees held by the tenant. Spelman in the Glossary[3] says so; but un-

[1] p. 29. [2] On Dignities, c. 1, § 13, ed. 1810.

[3] "Tenere per integram Baroniam, olim fuit tenere per 13 feoda militis et tertiam partem, recentius per hæreditatem Baronis sive majorem sive minorem; sed relevium Regis ex utrâque in omnibus par fuit, id est hodie 100 marcæ." Ed. 1687, pp. 67–72.

fortunately, his authority is assailed, because he refers to a work entitled *Modus tenendi Parliamentum*, which, from the use of the last word, is reasonably believed to have been written at a later date than it professes. But other considerations will show that the phrase *per Baroniam* referred to the tenant's obligation as a feudal tenant, and did not express his political capacity. The 11th Art. of the Constitutions of Clarendon has been cited.[1] The meaning of that Article is, that archbishops, bishops, and all persons[2] who hold * of the King *in capite*, hold their possession "as a bar- * 61 ony," and are bound to observe and perform the royal customs, and to answer to the ministers and the justices of the King, and, like other barons, take part in the judgments of the King's Courts till the judgment arrives at loss of members or of life, when the Ecclesiastics were to withdraw. The *Cæteri Barones* were those who held of other liege Lords and not of the Crown, for, at that time, Lords whose possessions were ample enough, and there were many such (Hallam[3]), could make the grant of a feud sufficiently large to be regarded as a barony, and the feudal tenant (for this was before the Statute of *Quia Emptores*) held a barony from the grantor. The full measure and extent of the feudal duty was this: besides the military service, and the suit in the Lords' Court, the tenant was bound to furnish reliefs for ransoming the Lord when taken prisoner in war, for making the Lord's eldest son a Knight, and for marrying the Lord's eldest daughter. It is a fallacy to confound the Court of the Lord with the Court of Parliament, as we now regard it. This will become more apparent when the language of Magna Charta is considered. The original Charter of King John is not that which is printed in our statute book, for it is not regarded

[1] See ante, p. 32, n.

[2] The words "*et universæ personæ*" were treated in the argument as meaning "all persons whatever," which reading makes the *et* embarassing for the construction of the rest of the sentence; but if the words "*universæ personæ*" receive the signification which Lord Littleton (Hen. 2, vol. 4. p. 370), and Reeve (Hist. E. L., vol. 1. p. 76), and Blackstone (1 Com. 384), give them, "dignified clergymen," the sentence becomes perfectly clear. It would then be "archbishops, bishops, and all the clergy of the realm who hold of the King *in capite*," &c. The Pope was directing his attention to the limits of the rights and obligations of the clergy of all ranks who, in virtue of their holdings of land, might be called upon to discharge temporal duties.

[3] 2 Mid. Ages, 433, ed. 1829. See also 1 Dug. Bar. 25; Litt. Hen. 2, vol. 2, p. 218.

as one of the statutes of the realm. That printed is the 9
* 62 Hen. 3. The charter relied on by the claimant is that of * King
John. In that charter is this passage: [1] "*Nullum scutagium vel auxilium ponatur in nostro regno, nisi per Commune Concilium regni nostri, nisi ad corpus nostri redimendum, et primogenitum filium nostrum militem faciendum, et ad filiam nostram primogenitam semel maritandam: et ad hoc non fiat nisi rationable auxilium,*" where the distinction between ordinary feudal, and extraordinary or public impositions is clearly drawn. Afterwards it goes on, "*et ad habendum Commune Concilium Regni de auxilio assidendo aliter quam in tribus casis prædictis,*" that is, otherwise than in the three aforesaid cases, we will cause to be summoned the archbishops, bishops, abbots, earls, and greater barons, and so on. This clearly settles the distinction between the two things. Observe, too, that in all the writs of summons, the summons is, not to treat of ordinary feudal duties, but, "*super quibusdam arduis negociis,*" so that, in every way, the distinction is fully preserved throughout. The argument that the right of being summoned to Parliament is feudal, and an incident of tenure, is therefore a *petitio principii*,— the old fallacy of *post hoc ergo propter hoc.* It is exceedingly likely that the great tenants of the Crown were the persons who would be summoned to Parliament; but it is by no means proved, nor is there any probability that a summons to the *Commune Concilium* of the realm was a right incident to the feudal tenure created by the grant of a fief to be held in barony. There is nothing to the same effect in the two charters of Henry III., except that in the second of them, granted in 1217, it is said, in the 44th section, "Scutage from henceforth shall be taken, as it was accustomed to be taken in the time of King Henry, our grandfather." These words are repeated in the third Charter of Henry III.

* 63 * Then, who were the *Majores Barones?* There is no trace
of such an expression anterior to John's Charter, and no public record repeats the phrase. [LORD KINGSDOWN. — Do the words *Majores Barones* necessarily mean a distinct class, or do they mean that the King will summon the principal barons of the realm?] The latter is the only intelligible and proper meaning. But if there was a class of *Majores Barones* properly so designated, there is no evidence whatever that a Berkeley was one of the number.

[1] 1 Rep. Dig. Peer. 64. 3 App. of the Claimant, p. 80.

The name does not appear in any list of the barons in arms for or against the King, or of those twenty-five who were elected to watch over the observance of the Charter. It is assumed that when a barony was granted, the tenure by barony made a *Major Baro*, within the meaning of King John's Charter, with a recognized right to be summoned to Parliament. There is nothing to justify that assumption, and yet that constitutes the groundwork of the whole claim. In the reports on the Dignity of Peer, carefully prepared, and well considered, are many passages which discountenance the assumption;[1] and the fact which the rolls of summons disclose, namely, that the number of persons summoned was continually varying, fully justifies its denial. The proposition contended for is, that all the *Barones Majores* had the right to be summoned; nevertheless, it appears that in the reign of Edward I. the persons who held by barony were, at least, one hundred and fifty, but only sixty-six were ever summoned; while, at the same time, twenty-one were summoned who did not hold by barony. There are many passages in the first report which show similar instances of the use of what appears to be a discretionary power claimed and exercised by the King.[2] In the reign of Edward I., and in the early part of Edward II., the number was generally about eighty, but afterwards it was only fifty and sometimes under forty.

* It is needless to inquire what was the position of a Baron * 64
of the Crown, in reference to the King as his liege Lord, anterior to the constitution of Parliament. But subsequent to that there is no evidence of any one coming to sit in this House except by virtue of a writ of summons from the Crown. If, therefore, any such right as that now contended for ever had existed, it has been lost by desuetude, and this must apply to the *Majores Barones*, whoever they were, as it does undoubtedly apply to the tenants *in capite*, all of whom, if the words of John's Charter are taken literally, were entitled to be summoned, and who certainly have not been summoned for ages. In Sir Francis Bacon's argument in the *De Roos Case*,[3] in which he appeared as counsel for the claimant, it is said, "That barons were not tied to places doth appear by the *Earl of Shewsbury's Case*, but that it was an honour invested in the blood, and though the capital seat of the barony

[1] 1 Rep. 44, 45, 64, 66.
[2] 1 Rep. 289, 290, 292, and the Register of the Summonses.
[3] Collins, Bar. 170.

was alienated, yet the barony was not extinct." And Sir Randolph Crew, who was counsel with him, argued, "If baronies were tied to lands, an Earl, giving the seat of a barony to a younger son, should make a Baron, which none can do but the King himself, *Jus gladii est indivisibile*, but *jura* are *divisibilia*." So Lord Coke[1] treats it as essential to sitting in this House, that the blood should be ennobled. And a writ of summons in all cases was necessary. Even, supposing a barony could be included in the Statute *De Donis*, there must have been a writ corresponding with the tenure of the barony. And Lord Coke,[2] after stating that there were one hundred and eighteen monasteries founded by the Kings of England, says: "Whereof such abbots and priors as were founded to hold of the King *per Baroniam*, and were called to the Parliament by writ, were Lords of Parliament, and had places and voices * 65 there," which clearly shows that the mere possession * of land, *per Baroniam*, was not sufficient to give a seat in Parliament, but that the King must, for such a purpose, send to the tenant a writ of summons.

Then, again, the resolutions of this House may be referred to as most important guides in this matter. First, there is the resolution, 1st February, 1640,[3] "that no person that hath any Honor in him, and a Peer of this realm, may alien or transfer the Honor to any other person. . . . That no Peer of this realm can drown or extinguish his Honor (but that it descends to his descendants), neither by surrender, grant, fine, nor any other conveyance to the King." But it is said that this claimant is entitled to a writ of summons *de jure*. That proposition is totally at variance with the well-established principle of constitutional and feudal law, that the Crown may, at its pleasure, refuse to accept the services of any of its tenants. That refusal occurred in the *Duke of Buckingham's Case*,[4] where it was held that the office of Constable of England continued in the Duke, who might be compelled to execute it, but that, nevertheless, the King might refuse the performance of the said office. [THE LORD CHANCELLOR. — What would be the status of a person who held a barony by tenure, but had not been summoned? In the case of a peer created by patent dying, his son cannot sit in this House until he has a writ of summons, but he would be enrolled immediately, and if he were to commit an

[1] 1 Inst. 16 *b*.
[2] 1 Inst. 97 *a*.
[3] Lords' Journals, 1 Feb. 1640.
[4] Keilwey, 170, M. T. 6 Hen. 8, note 5.

offence he would be tried by his peers.] There is a great difference between being a Peer of the Realm — *inter pares regni* — and the position of a Lord of Parliament. It is the writ of summons, and not the reason or the occasion of the writ of summons, that constitutes the status of *a Lord of Parliament. *66 Madox says,[1] that "holding by barony, and being summoned to attend amongst the Barons in Parliament, were in those times very different things;" and again, he says,[2] "Arundel was an ancient Honor, and the castle of that name the capital seat of that Honor. Upon this basis it hath been supposed by some men, that if a commoner should purchase the Honor and castle of Arundel, he would straightway become Earl of Arundel without any creation. I do make bold to oppose that assertion. . . . No man, or number of men, without the King, can, or ever could, make an Earl or Baron. . . . There never was (for aught that I know) an instance of any man's coming into seisin of an Honor by purchase, or contract with a subject. This is another instance of the mischief of confounding land honors with titular Honors. If a man have a noble fief vested in him, that is a good basis to build nobility on." The last sentence affords the key, no doubt, to many créations, but that is a very different thing from the mere possession of the fief giving the right to the Honor. Camden[3] is to the same effect. And Selden[4] treats all the tenants-in-chief as *Barones*, though he says, that for some reason, of which there is no clear explanation, some were in John's Charter called *Majores*, and so distinguished from the rest. There is another passage from Selden[5] to the same effect, but it is desired that the following passage which is of another kind from the same author should be read. Selden there[6] says: "By reason of the alteration which those laws touching baronies have induced, there were, in the time of our present division, or between the latter part of King *John's *67 reign and the middle of Richard II., two kinds of barons, barons by writ and tenure, and barons by writ only. Barons by writ and tenure were such as having the possession of their ancient baronies, were called by several writs to the Parliament according to that of King John's Charter, which concerns the *Majores Barones* of the time of making it. Barons by writ only were such as

[1] Exch. 534.
[2] Baronia Anglica, 23.
[3] Britannia, ed. 1607, p. 122.
[4] Tit. Hon. part 2, c. 5, § 21.
[5] Tit. Hon. part 2, c. 5, § 21.
[6] Tit. Hon. part 2, c. 5, § 22.

were called by a like writ of summons, although they had no possessions that were honorary baronies. For also the ancient baronies were now become, in common language, to be twofold; either such as were legally baronies and honorary, and supported the title of Baron in the ancient possessors, their heirs or successors, or such as were now, but abusively, called baronies, by reason of the ancient application of that word to them (before the latter part of King John's reign), and were in truth estimable but as knights' fees only, which were not honorary baronies, as is before showed. And of both these kinds divers remain and have the name of baronies to this day." The effect of that passage undoubtedly is to show that there were baronies by tenure, but not that the tenure had the least power to confer a seat in Parliament except upon summons by writ, while it does distinctly show that there were parliamentary barons constituted by writ alone. To which it need only be added, that when the title to a seat in this House had been once created, the records of the House were thenceforth the proper evidence of the title. [LORD CRANWORTH.—The conclusion of the passage in Selden is important: "The like is to be said of the baronies also that were of the honorary possessions of the ancient barons, and have been aliened by them. For though these have often retained the name of baronies in other hands, yet they were so styled but in regard of their being, in truth, honorary baronies formerly. And their barons
* 68 * became, upon such alienation also, barons by writ only (retaining their ancient place and dignity), because their possessions were gone, which at first made their ancestors barons by tenure."] That passage is important, indeed conclusive.

The law of Scotland has been referred to, and Wight's book on the Parliament of Scotland [1] shows that the English and the Scotch Parliaments took similar forms about the same time, and in Bell's Dictionary of the Law of Scotland [2] it is said, "Anciently in Scotland, all those vassals who held their lands immediately of the Crown were termed barons. When titles of nobility were conferred on barons, they were called the *greater Barons*, but both the greater and the lesser barons sat indiscriminately in the Scots Parliament until 1427, when by the Act 102 of that year the attendance of the lesser barons was dispensed with, on condition of their sending representatives from each county, to be called 'Commissioners of

[1] pp. 19–22. [2] *Voce* Baron.

the Shires.'" This explanation of what occurred in Scotland goes far to remove the puzzle which the term *Majores Barones* has occasioned in England.

From all these things it seems just to conclude that there was no legal source nor origin, no legitimate beginning, of the title of a Lord of Parliament, except by a writ from the Crown anterior to Richard II., and in subsequent times, except by a writ and a patent. If so, there is an end of this claim.

A few words only as to the historical statement of the Lords of Berkeley sitting in Parliament. The first writ issued to any one of them was in the 23d Edw. 1, when Thomas was summoned; but his son was summoned at the same time. Both could not have sat by virtue of the *same tenure of the same *69 castle and barony, though both might have sat on account of the favour of the Crown. Nothing occurs to call for an observation till the 5 Hen. 5, when the last Lord of Berkeley died, leaving only a daughter, who was married to the Earl of Warwick. James de Berkeley was entitled to the barony, but it is said that he was kept out of possession till 9 Hen. 5, and then he was summoned to Parliament. Assuming the dates here to be correct the facts would prove nothing, unless it could be shown that James was then summoned *de jure* in consequence of getting possession of the barony. He was tenant of it, certainly, but is there any thing unreasonable in the circumstance, that a person possessed o great property should be summoned to the councils of his sovereign? Then, in the reign of Henry VII., a settlement of the lands constituting the barony was made by the Marquess of Berkeley on that King and his heirs male. After the death of the Marquess without issue the barony remained in the Crown during fifty-four years; and it must be, no doubt, admitted, that in fact the Berkeleys never were during that time summoned to Parliament. The fact is attributed by the claimant to the barony being in possession of the Crown. But no such inference arises. In the 14 Hen. 8, Maurice Berkeley, then Captain of Calais, is offered a writ of summons, and Maurice, as the letter referred to [1] shows, took time to deliberate whether he should accept the honour. He could not have hesitated on account of his anticipating to become entitled to the estate of the barony, for at that moment such a thing seemed the most remote in the world; and, in fact, it did not happen till

[1] Ante, p. 27.

many years afterwards, namely on the death of Edward VI.
*70 He appears, by the terms of the letter addressed * to him, to have considered himself as possessed of a present right (which certainly could not be in respect of the possession of the barony), and therefore he hesitated about accepting the new creation. His friends advised him to postpone claiming this present right, and he consented. The present right could not be in respect of the barony, but it might be in respect of the creation by the writ of 23 Edw. 1, or of 9 Hen. 5, and that renders the whole matter intelligible. He considered himself entitled to precedence, not on account of the barony, of which he could not hope to get possession, but on account of one or other of the writs which had undoubtedly been issued to his ancestors; probably that of 9 Hen. 5, since the peerage created by the former seems to have been then in abeyance.

The cases relied on by the claimant are those of *Arundel*, *Abergavenny*, and *Greystock*. The first undoubtedly stands as a great anomaly. But even that case leaves it doubtful whether the castle conferred the title, or the castle was always to be held with the title. But there is a great distinction between the *Arundel Case* and the present claim. In the former the claim put forward in the petition is,[1] that "his ancestors, Earls of Arundel, Lords of the Castle Honor and Lordship of Arundel, have had their place of sitting in the Parliaments, &c., for a time whereof memory runneth not, by reason of the Castle Honor and Lordship aforesaid, to which the said name of Earl has been united and annexed for the time above said, of which Castle Honor and Lordship the said supplicant is now seised." There the claim is, that the seat in Parliament and the possession of the castle and Honor had immemorially gone together. Here the right to the seat is
*71 claimed as an incident, affixed * by law to the Barony of Berkeley. [THE LORD CHANCELLOR.—Both the cases may possibly be established, but they certainly rest on very different foundations.] Certainly: and the case of the *Earldom of Arundel*, if it decides what is supposed, is one *sui generis*, and cannot in any way be referred to as supporting the present claim. The Act of Charles II., passed as to the earldom, is not easy to be understood; but if any consistent and intelligible representation of it can be given it is probably this, that the Earldom of Arundel had been a

[1] Third Append. Berkeley Claim, pp. 89–93.

dignity of immemorial antiquity. Earls were well known in the Saxon times, and earl is not a title of feudal dignity; baron does indicate feudal tenure; earl does not indicate any tenure at all. The Earls of Arundel may have been earls immemorially, and may have had immemorial possession and enjoyment of the Honor and Castle of Arundel; the two things may have gone together. And then the Act of Parliament may be understood as doing that which is intelligible, namely, as tying the estate on to the earldom, not as recognising the earldom to be tied to the estate; not that the estate created the dignity, but that the dignity was supported by the estate. If this is the proper mode of viewing that case it is no precedent for the present claim.

As to the Barony of Abergavenny, though there was an allegation that it was a barony by tenure, yet there was no decision upon that claim of right, but both the claimants submitted to the exercise of the prerogative of the Crown.

The case of *De L'Isle*, and the case of *Greystock*, are mere illustrations of the same mode of conclusion. But a few observations are necessary on the case of *Fitzwalter*, which is conclusive of the whole matter in point of authority.

The *Fitzwalter Case* occurred but a few years after the passing of the Statute 12 Car. 2, c. 24. A petition was * presented *72 to the King. It was in the power of the Crown at that time to refer cases of that kind to any tribunal to advise the Crown as to the case. This petition was presented to the two Lord Chief Justices, and the Lord Chief Baron, together with the Chief Serjeants-at-Law, the Attorney and Solicitor-General, and other of his Majesty's counsel.[1] The report then made has already been referred to. There one side claimed to be a peer under a creation by writ; the other insisted that he was "a Baron by tenure." The counsel for the petitioner "denied that it was a barony by tenure, and offered to argue the same. Upon which, both parties being ordered to withdraw, the nature of a barony by tenure being discoursed, it was found to have been discontinued for many ages, and not in being, and so not fit to be received, or to admit any pretence of right of succession thereupon." It is impossible to have any thing more conclusive. But there was in the operation of the Statute 12 Car. 2, c. 24, an additional reason against it. That statute, passed a few years before, had completed an effectual right of alienation of land. All

[1] See ante, p. 54.

tenures *in capite* were abolished; all tenures were reduced to free and common socage; and so it became utterly inconsistent with the whole condition of the law of real property that this tenure should be considered as continuing, and that reason must apply here. If the holder makes a lease of the estate, is the estate to go to the lessee, or can a series of life estates be created, and members of this House be thus called into existence? The 11th section of the statute, the saving clause,[1] as it is called, does not justify this claim, although it has been much relied on for that purpose. A saving clause cannot be argued upon as containing a statutory recognition of the existence of that thing *73 *or of that right which is professed to be sacred. Its only object is to keep some particular question or matter untouched by the statute. To give it the construction now contended for, would be to make every saving clause a determination of the question, which it professes to leave undetermined. It was an assumption made by the claimant, that there could not, previously to the Statute of Charles II., be any alienation without license from the Crown. Alienations might have been made upon ordinary fines. A fine would have been payable, nothing more. There is no reason for holding that lands created into barony did not partake of the ordinary liberty of alienation incident to other lands, no reversion being in the Crown. All that Parliament did, was to suppose that there might be a possibility of a thing of this kind, and to declare that the enactments of this statute should not prejudice that question. Some general notion might have been in the minds of the framers of the statute, that there was such a thing as a barony by tenure, and accordingly they introduced the clause not to determine, but to leave undetermined, any claim existing under such a state of things. But to convert such a clause into a Parliamentary recognition of such a state of things is entirely to change the nature of the saving clause, and to use it for a purpose for which it never was, and never ought to be, employed.

My learned friend, to whose labour, industry, and learning, I bear very willing testimony, desires to say that he was surprised the other day into what might appear to be an admission, that the dignity would go under a commission of bankruptcy.

[1] See ante, p. 30.

THE LORD CHANCELLOR. — He cannot properly withhold that admission, on the premises he assumes.

Mr. Fleming. — I only desire to say, as I have throughout * maintained, that, in order to entitle a person to the dignity *74 of Baron of Berkeley, he must be the successor of Robert Fitzhardinge, reading the word "heirs" as including "successors;" and I submit that a person making title, not through the act of the successor of Robert, but against that successor, would not be a person entitled. [THE LORD CHANCELLOR. — Why?] He would claim only by the title which the Act of Parliament gives to a person claiming under bankruptcy. I treat the word "heirs" as embracing "successors." In that sense, a person taking under an assignment, would not be a successor. A person taking by a disseisin, or by a title paramount to that of the heirs of Robert Fitzhardinge, would not be entitled, and a title under the bankrupt laws, however valid and legal, is in the nature of a disseisin, and is not a title under a voluntary act of a former possession.

1861. Feb. 26.

THE LORD CHANCELLOR (LORD CAMPBELL). — My Lords, we are called upon to consider a petition to Her Majesty, praying that the petitioner may be declared entitled to the dignity of Baron of Berkeley, and that a writ of summons to Parliament may be directed to him, as Baron of Berkeley.

The petitioner rests his claim on the fact that he is seised, as tenant for life, in possession of the Castle of Berkeley, in the county of Gloucester, and of the manors and hereditaments which have, from time beyond memory, constituted the Barony of Berkeley.

He has proved that he is so seised under the will of Frederick Augustus, Earl of Berkeley, dated 13th April, 1810. My Lords, I do not think that the limitations of this will have, as yet, been fully laid before your Lordships; * and I think that they *75 may be material, as showing to how many persons, as tenants for life, the hereditaments constituting the Barony of Berkeley are limited, and might be taken by them as purchasers under the will.

By that will the testator devised these hereditaments (*inter alia*) to trustees, for a term of two thousand years, to secure an annuity

of £2,000 a year to his widow, for her life, and various other annuities and charges, with a right to distrain for them, and to enter and take the rents and profits till the arrears should be satisfied; remainder to William Fitzhardinge Berkeley for life; remainder to his first and other sons in tail male; remainder to the claimant for life, and to his first and other sons in tail male; remainder successively to each of the testator's five other sons then born (namely, Augustus, Francis Henry, Thomas Morton, George Charles Grantley, and Craven), and as many more sons as might thereafter be born, for life, and their first and other sons in tail male; remainder to the daughters successively of each of his sons then born and thereafter to be born in tail male; remainder successively to each of his (the testator's) three daughters (*nominatim*) then born, and as many more as might thereafter be born, for life, and to her first and other sons in tail male; and in default of such issue, to her first and other daughters in tail male; with a remainder interposed in the case of each of his (testator's) daughters "to the use of any husband with whom she might intermarry, and who should survive her, and his assigns, for or during the joint lives of him and of any heirs male of such daughters by such husband;" remainder to testator's brother, George Cranfield Berkeley, for life; remainder to George Henry Frederick Berkeley (son of the said George Cranfield Berkeley), for life; remainder to his first and other sons successively in tail male; *76 remainder to the second and every other son of the *testator's said brother, George Cranfield Berkeley, in tail male; remainder to his (testator's) own right heirs for ever.

The said William Fitzhardinge Berkeley, who was created Lord Segrave and Earl Fitzhardinge, died on the 10th of October, 1857, without ever having been married.

Thereupon the claimant became entitled in possession to the life estate so limited to him, and has thenceforth been in possession of the castle and hereditaments constituting the Barony of Berkeley. Since the petition was presented, the term for two thousand years has been surrendered and merged in the inheritance; so that the claimant is now seised of the legal estate for his life.

I think it is likewise proved that, in the reign of Henry II., and in succeeding reigns, there was a barony by tenure, enjoyed by several successive Barons of Berkeley in respect of these hereditaments.

But I am of opinion that the claimant has not made out his claim.

Assuming that there were anciently baronies by tenure, and that the Barony of Berkeley was a barony by tenure, he has not shown that, according to the incidents of such a tenure, a right to be summoned to Parliament as a Baron, under such a title as he discloses, ever could have been set up. He has not shown that any one claiming, by purchase, a mere life estate in a barony ever sat in Parliament, or was summoned to Parliament, in right of the barony. He has not shown that any one ever sat in Parliament, or was summoned to Parliament, in right of a barony taken by him under a will as a purchaser.

Whatever may be the consequences of the law which the claimant contends for, we are bound to act upon it, if that law be clearly established. But these consequences are such as to raise a very strong probability against the existence of such a law, and to require that it should be established by very strong authority.

*Although we have always been told that the Crown is the * 77 fountain of honours, and, above all, that no one can be ennobled except by the Crown, and that the lawful heir to a peerage can only be deprived by Act of Parliament, or by forfeiture on attainder, of his right to inherit the peerage, nevertheless, according to the law propounded by the claimant, the last Earl of Berkeley had it in his power by will to deprive his legitimate sons of the right to succeed to the dignity of Baron Berkeley, and to limit that dignity successively to as many persons, strangers in blood, then alive, as he chose, and to their heirs male successively. The testator does actually limit it, *nominatim*, to seven males successively, and their first and other sons and daughters successively in tail male; to three females successively, and their first and other sons and daughters successively in tail male, with a remainder interposed to the husband of each, if he should survive her, with a remainder to another male for life, and the son of that male for life; remainder to the first and other sons of this son in tail; remainder to the first and other brothers of this son in tail. So that, under this will, the estates tail not being barred, there might be various individuals and various lines of Peers successively ennobled and created Peers of Parliament by a subject many years after he, himself, had been reposing in his grave.

The claimant finds it convenient to confine the alleged right to

be a Peer by such a creation to persons who have an estate for life, and are possessed of both the legal and equitable interest in the hereditaments constituting the barony. But no authority is cited to draw the line between that and a still more limited interest in the hereditaments constituting the barony, or to show that a seisin in the barony for the life of another, or that a term of years in *78 the barony while it lasts, should not give the same right * as an estate for life, or that the right might not be enjoyed by the mortgagor of the barony, after a mortgagee in fee, or that it might not be claimed by the mortgagee.

Supposing the owner of the barony to be seised in fee, if he should be adjudged a bankrupt or insolvent, what becomes of the dignity? We are told that it would not vest in the assignee, because he has not the beneficial interest in the barony; but in that case, the barony must be put up to auction, and sold to the highest bidder, and this purchaser, having both the legal and beneficial interest in him, would, according to the law relied upon by the claimant's counsel, be entitled to a writ of summons, and to take his seat among your Lordships, whatever may be his complexion or his antecedents, so that he is a native-born subject of Her Majesty, and has not been convicted of treason or felony. According to the claimant's law, the blood of this purchaser would no doubt be ennobled. But there is some difficulty as to the point of time when this process would be completed; whether, on the execution of the conveyance to the new Peer, or on his receiving the writ of summons, to which, *ex debito justitiæ*, he would be entitled, or on his taking his seat in this House. For any felony committed by him previously, he, no doubt, would now be tried by his peers; but a difficulty would arise if he were to re-sell the barony. From what point of time would his blood be unnobled? And how would he be tried for any felony he might have committed while a Peer?

Another consequence would be, that any one seised of an estate for life of all the lands and hereditaments which once constituted any barony by tenure, and in respect of which the owner had once been summoned to Parliament, might now claim to be a Peer while he remains so seised, and might insist upon his right to sit as a member of this House.

*79 *There being an admission that barony by tenure once existed, we are called upon by the claimant's counsel to explain when and how it ceased to exist. My Lords, I say that barony

by tenure, with such incidents as would justify the present claim, never did exist.

It is now fully settled that the law of the Peerage of England depends entirely on usage, both as to the power of the Crown, and as to any claim that may be made by a subject.

It has been solemnly decided by your Lordships, in the exercise of your unquestionable jurisdiction, that the Crown cannot create a peerage for life, with a right to sit in this House, and the *ratio decidendi* was, that no instance could be adduced of a Peer sitting in this House in right of a peerage granted for life only.

When a claim similar to the present (or rather, exactly and identically the same claim as the present) was made in the year 1830, by the first tenant for life under the will of Frederick Augustus, Earl of Berkeley, and the claim was supported at your Lordships' bar with great learning and ability by a most distinguished advocate, now a venerated member of your Lordships' House, the Earl of Eldon put to him the following crucial question: "Will you just give me leave to ask you, Mr. Brougham, whether, among all the authorities, you ever found a case of a devise of the land and the Honor with it?" My noble and learned friend answered, "I admit that I do not find any authority that has dealt with it in that way. I do not find any text-writer laying it down in words, that if there be a barony by tenure, and the barony be throughout annexed to the land, he, who takes the land under the gift and the barony with it, may deal with the land in the way which one of your Lordships has referred to."

Lord Eldon (as might have been expected from him) * then * 80 expressed no opinion, as the argument was not concluded; but he put no other question during the argument, and (as might be expected) he seemed quite satisfied, from the answer he had received, that the claim could not be supported. There being no instance to be found of a barony by tenure, with a right to sit in Parliament, being transferred to a stranger by will, the constitutional and legal inference was, and is, that such a transfer cannot be lawfully and effectually made.

If it could be shown that, without the sanction of the Crown, there had by a conveyance *inter vivos* been the transfer in fee or in tail of a barony by tenure to a stranger who had been summoned to Parliament in right of the barony, such an instance would have been quite insufficient to prove that such a transfer could be made

by *will*, and that the testator could limit the dignity of a Baron to a succession of tenants for life and their sons in tail, according to the rules by which tenancies for life, or any greater interests, may be carved out of the fee simple of land. But the precedents relied upon of transfer *inter vivos*, when examined, will be found to be transfers *with the sanction of the Crown*, or in which the Crown confirmed the re-settlement of the barony; the absurd consequences being thus avoided, which necessarily flow from the supposed absolute power of a subject, *proprio vigore*, to create Peers, and to confer upon them a similar power of creating Peers. Thus, in the cases of the Earldom of Lincoln, granted by the Earl to his sister, of the Earldom of Leicester, granted by the Earl to his youngest son, and the grant by Edward Deyncourt to John Deyncourt of the barony, by virtue of which he sat in the House of Lords, the grants were all expressly licensed and confirmed by the Crown.

By the Peerage law of Scotland there was a power (solemnly *81 decided in the *Purbeck Case* not to exist in *England) that a Peer might surrender his peerage to the King, who might re-grant the same peerage with fresh limitations.

But it is wholy inconsistent with the usages which have prevailed in any European monarchy to suppose a law by which a Peer, of his own authority, and according to his own caprice, might transfer the peerage to a stranger, might confer a privilege on this stranger to demand a summons from the Sovereign to sit in the Great Council of the Realm, and might compel the unwilling Sovereign to receive the homage of the Peer so created. In France, before the Revolution, where certain estates conferred on the owners particular titles of nobility, these titles were merely honorary, and could be claimed and enjoyed only with the approbation of the Sovereign.

The counsel for the claimant laid his main stress on the 11th section of 12 Car. 2, c. 24. [His Lordship read it, see ante, p. 30.]

Had there been proof that, before and at the time when this statute was passed, such a claim as is here made of a peerage under a will by a stranger in blood to the first grantee, and to the last possessor of the peerage, could have been sustained, and had the objections to the claim been founded on any of the enactments of this statute, the saving clause would have been most important. But I am of the opinion that, before and at the time when the Statute 12 Car. 2, c. 24, was passed, this will would not have carried

the dignity of Baron of Berkeley to the claimant; and the objections to the claim are in no degree founded on any of the enactments of that statute.

The saving clause is therefore unavailing. It does admit that a title of honour by which persons have or may hereafter have a right to sit in the Lords' House of Parliament, and the privilege belonging to them as Peers, might * be affected by the tenure *82 of land; but it does not in the slightest degree show, or countenance the notion, that any title of honour, whether territorial or personal, could by testamentary disposition be transferred to a stranger.

Can it be contended, then, that as to peerages by tenure, if any existed, this was an *enabling* statute, empowering the Peer seised in fee simple to devise the lands constituting the barony, and the peerage along with them, successively to a series of strangers, there being a limitation to each of an estate for life or an estate tail?

The statute does facilitate alienation, by doing away with all fines for alienation, which had been preserved when, by 1 Edw. 3, c. 12, forfeiture for alienation without license was done away with; but neither the conversion of tenure by knight's service into common socage, nor any of the other provisions of this statute (taken from the ordinance passed in the time of the Commonwealth), can be construed into a power to be conferred on private citizens, on subjects, to create Peers.

My Lords, having taken this general view of the subject, as I expect to be followed by several of my noble and learned friends, who I know have devoted great attention to it, and are most highly competent to give your Lordships the best advice in deciding upon the petition, I abstain from entering into the arguments more in detail, and from minutely examining the authorities relied upon on behalf of the claimant. I will content myself with repeating the words of a few of the sages of the law who have given express opinions on this subject.

All the Judges consulted in the *Fitzwalter Case*, with Sir Matthew Hale at their head, declared, "that whatever pretence there might be for presuming that there were originally baronies by tenure, yet that baronies by tenure had been discontinued for many years, and were then not * in being, and so not fit to *83 be revived, or to admit any pretence or right of succession

thereupon; and that the pretence of barony by tenure was therefore not to be insisted on."

This accords with the resolution to be found in your Lordships' Journals in the case of the *Lord de Grey* and *Charles Longeville*, Esq., concerning the titles of the Baronies[1] of Hastings and Ruthin in the year 1640, "That no person that hath any honour in him may alien or transfer the honour to any other person."

Madox, in his "Baronia Anglica," commenting upon the case, chiefly relied upon by the claimant, says, "Arundel was an ancient Honor; and the castle of that name the capital seat of that Honor. Upon this basis it hath been supposed by some men, that if a commoner should purchase the Honor and castle of Arundel, he would straightway become Earl of Arundel, without any creation. I do make bold to oppose that assertion. As it is agreed in the Courts of law, that the King of England is *Fons justitiæ*, the fountain of justice to his subjects, so it is also agreed in the Court of Honor and Chivalry, that the King is *Fons honoris*, the fountain of honour to his subjects. No man, or number of men, without the King, can or ever could make an Earl or Baron. To grant a baronial title is an act of regality inseparable from the Crown, and incommunicable to subjects; that is, it was never yet communicated. In the first place, when baronies were in being in England, a man could not purchase and enjoy an honour or barony (suppose that of Arundel or any other) without the King's consent. There must have been a royal license made to the grantor to grant, and to the grantee to purchase or take such Honor. In the
* 84 next place, a man * could not become the King's man, *Homo*, or *Baro Regis*, without doing homage to the King. If the King was not pleased to accept his homage, he could not purchase or hold an honour. Thirdly, a man could not have seisin of an honour without having it from the King's hand. Every honour originally passed from the King; and upon every change, by death or otherwise, returned to the King again, and remained in his hand until he commanded seisin of it to be delivered to his homager, according to the law or custom of noble fiefs. Fourthly, there never was (for aught that I know) an instance of any man's coming into seisin of an honour by purchase, or contract made with a subject."

[1] Journals, 1 February, 1640.

My Lords, I formed my judicial opinion on this question, having regard only to what must be considered strictly judicial authority, independently of the reports of the Select Committee of your Lordships' House, "appointed to inquire into the origin of the dignity of Peer of the Realm, and of the different degrees of that dignity, and the means by which a right to the dignity may be acquired," presided over by that very learned jurist and antiquary, the first Lord Redesdale. But I must say, my Lords, that it gives me great satisfaction to find the opinion of this Select Committee, after a most laborious examination of every thing extant connected with the question, to have been, "that for many ages all idea of a right to a writ of summons to Parliament by reason of tenure had ceased, and that the dignity of Baron, if not conferred by patent, was considered as derived only from the King's writ of summons."

I may be allowed, my Lords, before concluding, to say, what I sincerely feel, that the gallant claimant, from his high character and his distinguished services, would be an ornament to any assembly of which he may be a member. *But, in the painful discharge of my public duty, I am bound to move the resolution, "That in the opinion of this Committee the claimant has not made out his claim." * 85

My Lords, I ought to say, that Lord Kingsdown, who heard the argument in this case, authorizes and requests me to say, that he entirely concurs in the decision which I have proposed to your Lordships.

Lord Cranworth.—My Lords, that the claim of the petitioner referred to this House by Her Majesty will, if established, lead to consequences the most startling, cannot be disputed. He claims a right to be summoned to sit in this House as a Baron, in consequence of his being, under the will of the late Earl of Berkeley, tenant for life of the castle of Berkeley, and of the manors, lands, and hereditaments which he contends have, from time immemorial, constituted what he calls the Barony of Berkeley.

The late Earl died in 1810, having, by his will, devised the hereditaments in question, subject to a term of years now extinguished, to the late Earl Fitzhardinge, then William Fitzhardinge Berkeley, for his life, with remainder to his first and other sons successively in tail male, with remainder to the petitioner for his

life, with divers remainders over. The Earl Fitzhardinge died in 1857, never having been married, and the petitioner then became entitled to the devised property as tenant for life. The proposition for which he contends is, that he thereby acquired a right against the Crown, to be summoned to your Lordships' House as a Peer of Parliament.

His claim is made by his petition to rest solely on this right by devise from the late Earl of Berkeley. He does not waive or abandon any claim he may be able hereafter to establish by
* 86 heirship or otherwise, in case he should * fail in his present object; but reserving all such possible claims, he now calls on your Lordships to say, that, as devisee for life of the castle of Berkeley and of the other hereditaments given to him by the will of the late Earl of Berkeley, he is, on that ground, entitled to a writ of summons to this House.

Your Lordships cannot fail to observe, that, in thus putting his case, the petitioner admits himself, for the purpose of this inquiry, to be in no other way connected with this barony than as a devisee; that till the death of the devisor, neither the late Earl Fitzhardinge, nor the petitioner himself, had any more connexion with the Barony of Berkeley than had any other of Her Majesty's subjects; that to whomsoever the late Earl of Berkeley might have thought fit to devise the castle and lands in question for an estate of freehold, that devisee would have had the rights now insisted on by the petitioner.

The consequences to which the arguments of the petitioner necessarily lead are so startling, that nothing but the most cogent evidence can induce your Lordships to believe them well founded. It was not disputed that the petitioner might give or sell the castle and lands supposed to confer these important rights to whomsoever he might think fit. Now to give money in order to purchase a right to sit in the other House of Parliament, is a grave misdemeanour; but, if your Lordships adopt the arguments of the petitioner, he has indisputably the power to sell at whatever price and on whatever terms he may think fit, that which will confer on the purchaser the right not only to sit in this House, but to sit by a title which will at once give him the highest rank and precedence over all other barons. In the course of the long and elaborate investigation which this case underwent at your Lordships' bar the petitioner's very learned counsel, whose indefatigable

* research and able advocacy of his client's case we must all * 87
be ready to acknowledge, felt himself bound to admit that the consequence to which I have adverted must follow on his claim being allowed. He denied that it would necessarily follow that in case of bankruptcy the right would pass to the assignees, but he admitted, indeed he could not deny, that it would pass to a purchaser on a sale.

Now, my Lords, I confidently ask, whether this is not a *reductio ad absurdum*. There may be great difficulty in explaining all the anomalies or the apparent anomalies, as to the exact nature of the peerage, and of the constitution of this House in remote ages. It may be impossible to trace exactly how and when the Upper House of Parliament, as it existed under the Plantagenet Princes, settled down into its present condition. But that, if the right to sit in this House by reason of the tenure of particular lands, ever existed, it has now ceased to exist, is, I submit, a proposition which must be assumed as indisputable. It may be put in the form of a syllogism, thus: If the argument of the petitioner is well founded, the right to sit in this House may be bought and sold. But the right to sit in this House cannot be bought and sold. Therefore the argument of the petitioner is not well founded.

In the view, therefore, which I take of this claim, I do not feel that your Lordships are bound to go into any minute investigation as to what was originally the nature of tenure *per Baroniam*. Such an investigation may be interesting to the antiquarian; but your Lordships are entitled to say, that whatever were its incidents they either were not such as are now contended for, or if they were, they have in the lapse of ages ceased to belong to it, if indeed such a tenure now exists at all.

In the course of the argument addressed to your Lordships
* by the petitioner's counsel, it was intimated to him more * 88
than once, that many of the propositions for which he contended, were not, and could not, be disputed.

It is established beyond controversy that in the reign of Henry II., or indeed before the commencement of that reign, Robert Fitzhardinge, the ancestor of the late Earl of Berkeley, obtained a grant from that monarch of the castle of Berkeley, and of divers manors and lands connected with it; the evidence leading strongly to the inference that the same property had been held by the ancestors of this Robert Fitzhardinge at least as far back as the reign of

Henry I. It was also shown that the castle, manors, and hereditaments, which had formed the subject of the grant by King Henry II., descended from Robert Fitzhardinge to his son Maurice, then designated as Maurice de Berkeley, and from him to Robert, the eldest son of Maurice; Robert having died without issue, it passed to his brother Thomas; and from him it devolved in an unbroken line of male descent, through four generations, till it vested, in the 19 Edw. 2 (1326), in Thomas, described as Lord of Berkeley. It may be taken as established, that, at all events, from the time of Robert de Berkeley, the grandson of the first grantee of the castle, the owners were Barons, whatever were the rights attached to that state. And it is clear that, from the earliest time at which we have authentic records of the writs of summons, the Lords of Berkeley were always summoned to Parliament as Barons. It is also shown that as early as the 40 Hen. 3, the castle and lands of the Barons of Berkeley were sometimes, though certainly not always, called the Barony of Berkeley, and in the fourth year of the reign of Edward III., Thomas, the then Lord Berkeley, acknowledged on oath, that he held the lands and hereditaments in question, *per Baroniam.*

* 89 *I have thus traced the property, constituting what is called the barony, to Thomas, Lord Berkeley, in the reign of Edward III., because it is from the mode in which he dealt with it, and the consequences of its being so dealt with, that the strongest argument of the petitioner in favour of his claim was founded. In the twenty-third year of the reign of King Edward III., this Thomas, Lord Berkeley, in whom the property had then vested, in the year 1326, created an entail of the Castle of Berkeley, and the manors connected with it, and of the hundred of Berkeley, with the views of frank-pledge appurtenant to the manors, not, however, describing it as a barony, settling the same on himself for life, with remainder to his son Maurice, in tail male, with remainders over. On the death of this Thomas, the property passed, under the deed of entail, to Maurice, his son, on whose death, in 1368, it descended on his eldest son, Thomas. He died, leaving issue an only daughter, Elizabeth, who, of course, was excluded by the entail from the succession, and the property went, by force of the entail, to James, the nephew of Thomas, who was regularly summoned to Parliament from the 9 Hen. 5, to the 1 Edw. 4. He died in 1463, and was succeeded by his eldest son William. William was duly summoned

to Parliament as Baron Berkeley, until the 12 Edw. 4, but was afterwards raised in the peerage to the dignitaries successively of Viscount, Earl, and Marquess, and he died, without issue, in 1491. Before his death, being tenant in tail male of the castle and other lands and hereditaments which had been entailed by his ancestor, in the reign of Edward III., he suffered a recovery; and having thus barred the entail, he re-settled the castle lands and hereditaments, in default of his own issue, on King Henry VII. and the heirs male of his body, with the reversion to his own right heirs. Upon his death, without issue, the *property was *90 held and enjoyed successively by Henry VII., Henry VIII., and Edward VI., by virtue of the new entail.

William, the Marquess, left, at his death, a brother, Maurice, who, but for the recovery, would have succeeded to the property. He died in 1506, never having been summoned to Parliament, and having been treated as a commoner. On the death of King Edward VI., in 1553, there was a failure of heirs male of the body of King Henry VII., and the reversion, under the settlement made by the Marquess, came into possession. The person then entitled, as right heir of the Marquess, was Henry, the great grandson of Maurice, the brother of the Marquess. He obtained seisin of the estate, and sat in Parliament in right of the ancient barony, from the 4th and 5th of Philip and Mary. He was succeeded by his grandson and great grandson successively, who were regularly summoned to Parliament as Barons of Berkeley, till the latter was, in the reign of Charles II., created Earl of Berkeley. From him the earldom passed, in regular male descent, to the late Earl, the devisor, under whom the petitioner claims title.

The argument deduced by the petitioner, from these facts, may be thus stated: The right under which the successive Lords Berkeley, down to Thomas, the grandson of Thomas, the first settlor, sat in Parliament, must have been either a right by reason of their tenure of the castle and lands of Berkeley, or a right by reason of a personal dignity, arising out of the first writ of summons, which, as your Lordships are aware, when followed by a sitting under it, ennobles the person summoned, and creates a personal dignity, passing to the heirs of his body. The facts, it was argued, are inconsistent with the hypothesis of a personal dignity, and your Lordships must, therefore, adopt the other alternative, namely, a right arising from tenure. *That the right could *91

not have depended on personal dignity was shown, or attempted to be shown, from the fact that, on the death of Thomas, Lord Berkeley, the grandson of Thomas, the first settlor, a writ of summons was sent to his nephew, Sir James Berkeley, the son of his deceased brother James, which was consistent with principle, if the claim arose out of the possession of the land, but was wrong according to the rules regulating personal dignities; for, according to those rules, the right to nobility descended to Elizabeth, the daughter of Thomas, and would entitle her son, if she had left a son, to claim a writ of summons. It is true that she left three daughters and no son; but that does not alter the argument as to the right. The only consequence of that would be, that the dignity fell into abeyance. But it would be in the power of the Crown to terminate the abeyance in favour of any one of these three ladies or their heirs lineal.

This was the argument arising from the course taken on the death of Thomas, the grandson of the first settlor.

The argument arising out of the second entail was somewhat different. In order to understand that argument, we must recollect that on the death without issue, in 1491, of Marquess William, whom I call the second settlor, the castle and lands in question went to the Crown, and continued in the Crown till the accession of Queen Mary. During that long period of sixty-two years, no writ of summons, it is said, issued in right of the ancient barony. But immediately on the accession of Queen Mary, Henry, Lord Berkeley, as the heir of Marquess William, obtained seisin of the lands, constituting what the petitioner designates the barony. And from that time, Henry and the other persons who were successively in the possession and enjoyment of the lands, were summoned in the ancient right till, in the reign of Charles II., the then Baron
* 92 was raised to the dignity *of an Earl; from which time, he, and his successors in the earldom, sat of course in right of that higher dignity.

It is impossible, my Lords, at all events I feel it impossible, to deny that the arguments of the petitioner, founded on these settlements, and what took place under them, carry with them considerable weight; and I do not profess to be able entirely to explain the course in those remote times, pursued by the Crown. I will, however, state what has occurred to me upon it.

And first, as to the argument arising from the fact, that, on the

death of Thomas, Lord Berkeley, in 1417, leaving a daughter only, a writ of summons issued to his nephew, the son of his brother, though the dignity, if personal, would have descended to his daughter. It has now become familiar law to us that, when a person not noble receives from the Crown the ordinary writ of summons, commanding him to attend in the Upper House of Parliament, and in obedience to that writ he does attend, his blood, in the language of Lord Coke, is ennobled to him and his heirs lineal. The dignity descends to a daughter, if he leaves no son. This, I say, now is, and long has been, recognized as law; but I greatly doubt whether these principles were at all clearly understood at the time to which we are referring, nearly two centuries before Lord Coke wrote. From the "Reports on the Dignity of a Peer," that great repertory of learning on this subject, we collect that many persons in the early stages of our Parliamentary history were summoned and sat in Parliament, whose descendants were not afterwards summoned, though the persons so summoned had left issue male. And seeing, therefore, how very little our modern notions on this subject then prevailed, I cannot think it impossible that, independently of the doctrine of tenure by barony, the writ, on the death of Thomas, in 1417, without male issue, may *have been issued to his nephew James, under a mistaken *93 notion that the heir male was the person entitled to the dignity, and not the heir general.

With respect to the argument derived from the second entail, the only observation that occurs to me is, that although no writ was issued by Henry VII., on the death of Marquess William, to his brother Maurice, yet a writ was issued by Henry VIII., in the fourteenth year of his reign, to Maurice the nephew; and he having died in that same year, a writ of summons to the next Parliament, or rather, to the next Session of the same Parliament, was issued to his brother Thomas, under which he sat; and thenceforward regularly issued to his son and grandson Thomas, and Henry, Henry being the person on whom, as Lord Berkeley, the castle, lands, and hereditaments descended on the death of King Edward VI. It seems to me very possible that the writs thus issued successively to the two nephews and heirs of Marquess William were so issued because it was considered at least doubtful, whether they could not have claimed them as of right, notwith-

standing the entail which had given the lands to Henry VII., and the heirs male of his body.

I must, however, guard myself against being supposed to have made these observations as explaining away, at all satisfactorily, the argument of the petitioner on this part of the case; nay, I will go farther and say that, if it were admitted that there were sitting in this House two distinct classes of Peers,—Peers sitting in right of a personal dignity, and Peers sitting by right of the tenure of lands, such lands on their transfer carrying with them the right now contended for,—then I strongly incline to think that the argument derived from the two entails, and the dealing under them, would have been sufficient, with the other facts in 94* proof, to establish the petitioner's right. But that * is not the case. The petitioner has to show first, that there is such a class of Peers now existing, or capable of existing, or that there was such a class at the time in question; and for that purpose, I think all which he has established is wholly insufficient.

I should have thought so, even if the question were untouched by prior decisions; but this is not the case. The very same question as that now submitted to your Lordships was raised more than two centuries ago, in the claim of the Barony of Fitzwalter. In that case, Mr. Mildmay having claimed the Barony of Fitzwalter, was opposed by Mr. Cheeke, who alleged that he was the person entitled, on the ground that the barony was a barony by tenure. The question being one of great moment was referred to the consideration of the Privy Council, who heard the same on the 19th January, 1669, assisted by Chief Justice Keeling, Chief Justice Vaughan, the Chief Baron Sir Matthew Hale, and other luminaries of the law. By the report of the case, as given by Collins,[1] it appears that, on the counsel for Mr. Cheeke having insisted on the barony being a barony by tenure, and the counsel for Mr. Mildmay disputing that proposition, both parties were ordered to withdraw; and "the nature of a barony by tenure being discoursed, it was found to have been discontinued for many ages, and not in being, and so not fit to be revived, or to admit any pretence of right of succession thereupon."

This opinion of those very learned sages of the law seems to me founded in so much good sense, that I should have been content

[1] Bar. 287.

to say that I founded my opinion upon it exclusively of all other considerations. I cannot, however, admit that this is the only authority on the subject. The question put by Lord Eldon on the argument of this *claim when it was put forward by *95 the late Earl Fitzhardinge, the petitioner's predecessor in title, and which has been referred to by my noble friend the Lord Chancellor, indicates very clearly what was his opinion. He evidently thought the claim wholly unfounded. Another most eminent authority, the late Lord Redesdale, supposing him to be, as he is understood to have been, the author of the "Reports on the Dignity of a Peer," was clearly satisfied that no right to peerage founded on tenure has for ages existed. Indeed, he does not think that in the House of Lords, as now constituted, it ever did exist. It may be that in the time of King John, and for some portion of the reign of his son, the legislative assemblies, or assembly, consisted exclusively of tenants *in capite* of the Crown, and depended, therefore, exclusively on tenure. But, as is pointed out by the noble and eminent person to whom I have referred, in page 243 of the third "Report on the Dignity of a Peer," "It is clear that in and after the twenty-third year of the reign of Edward I., tenure did not constitute the members of one branch of the Legislature, the House of Commons; they were constituted by election, so that the old constitution of a Legislature wholly by tenure was therefore then no longer prevalent. In one branch it did not exist; and it may, therefore, have been considered as ceasing to exist in the other branch, so far as its existence was no longer necessary;" and again, lower down in the same page, he says, "Looking to what passed in the reign of Edward I., it seems impossible to say that all the writs issued by that Prince were issued according to law, if tenure by barony gave a right to a seat in the Lords' House of Parliament to any layman. It may, therefore, be fairly presumed that the right to a writ of summons by tenure was then abandoned if not expressly abrogated by law; and that in, as well as after, the *23d of Edward I., no person *96 was deemed entitled to demand, as of right, a writ of summons to Parliament as a Peer of the Realm by reason of tenure, but that all were considered as entitled to that dignity as a personal right, either by express grant of the Crown, or by usage, creating a prescriptive right in its nature, personal, and not territorial."

Whether this view of the nature of barony by tenure, or of the mode in which it ceased to give a right to a seat in this House, be in all its details correct, I do not think it necessary to determine. I think it sufficient to say, that the authorities to which I have referred are quite sufficient to satisfy me, with my noble and learned friend, the Lord Chancellor, that it will be the duty of the House to report to Her Majesty, that the petitioner has not made out his claim; and having had the privilege, by the courtesy of my noble and learned friend, of knowing the view he took of this case, I have endeavoured to avoid repeating many of the arguments which he has just expressed.

Lord St. Leonards. — My Lords, in this important case, the simple question before the Committee is, whether the petitioner, as tenant for life of the castle and estate of Berkeley, is in right of it, as a barony by tenure, entitled to require from the Crown a writ of summons to this House.

I will assume that the barony is still entire; considering the limited number originally of such baronies, although they comprised a large portion of the great estates in the kingdom, it excites no surprise to find that ages ago they had ceased to retain the character which gave to their possessors the right to attend the King in Parliament. Escheats, forfeitures, partitions, re-grants under new conditions, sales, and other acts and accidents, * 97 no longer left * them as baronies, the original tenure of which conferred the right now claimed. The Crown, too, ceased regularly to summon Barons by tenure, who ought to have been summoned even after Magna Charta; and when a Baron by tenure, like other Barons, could not sit in Parliament unless summoned, the right of succession was frequently interrupted. The writs of summons with a sitting created a barony by writ, although the barony by tenure as such had ceased to exist; whilst, therefore, a Baron retained his possessions, and sat in Parliament, it became unnecessary to trace the existence of the barony in its original character. The original grants of baronies by tenure do not exist; but they descended generally in the male line, and the parliamentary representation went accordingly, and not to the heir general; and this flowed necessarily from the nature of the feudal tenure and the requirements of the Crown. The barony and the sitting in Parliament thus became, as it were, united. But there could be

no transfer of the barony without the license of the Crown; and that check prevented the introduction into Parliament, through baronies by tenure, of persons not fitted to rank with the Barons of England. Dispositions by will of the legal barony, before the Statute of 32 Hen. 8, there could not be, for a tenant by Knight-service could not devise his land, though it was with the license of the Lord and of the King himself. Whilst, therefore, feudal tenures remained in full vigour, and baronial possessions passed to, or were settled on, male heirs, and could not be aliened without a license from the Crown, and the Crown did not hesitate, if it thought fit, to withhold a writ of summons from an alienee, the doctrine that the right to the barony carried with it the title of Baron with a right to sit in Parliament did not lead to much mischief, although many difficulties had to be disregarded in order to allow the rule to work.

*It is admitted by the petitioner's counsel that, to render *98 the possessor noble, he must have both the legal and equitable title to the land; yet how often were they severed? In the various instances in which feoffments were made to feoffees to the use of the feoffor's will, in order to evade the rule against devising such tenures, the absolute legal fee, to all intents and purposes, was vested in the feoffees, and the feoffor had at law neither *jus in re* nor *ad rem*. Yet such feoffees did not become Barons; and, indeed, the feoffor, who no longer possessed the baronial possessions which conferred the title on him, yet retained his title and his seat in the Lords' House of Parliament. It is said for the petitioner that feoffees never took the title, because they had not the beneficial interest. But that does not meet the objection; for if they (the feoffees) had only the legal estate, the owner had only the equitable interest, to which of course the title could not be annexed; and yet this difficulty was practically disregarded manifestly because the baronial tenure was wearing out, and the dignity was maintained independent of it. But such a tenure, now that no consent is necessary to the transfer of baronial possessions, would lead to great confusion; it would enable the possessor to sell by auction to the highest bidder the castle, &c., and the peerage, without reference to the purchaser's condition in life, and yet, having himself been called to Parliament by writ of summons, it would be found impossible to displace him, although he had sold the estate; and this process might, of course, be repeated as often

as parties thought proper. Such an anomaly could hardly be endured; it would be a breach of our constitution, which we could not suffer.

It is remarkable to what an extent the doctrine was carried. A woman was permitted to take under a settlement a life estate *99 both in the land and in the dignity. *And when a Peer in his own right was under a settlement entitled to the Earldom of Arundel for his own life, instead of assuming the title, he sold the life estate to the person entitled in remainder, and the sale was carried into effect by a grant from the seller to the purchaser of the estate for years, depending on the life of the seller, at a yearly rent, with a grant in remainder to a third person for a year, with a remainder to the purchaser. The latter, therefore, had only a lease for years, *pur autre vie*, at a rent in possession; yet he at once assumed the title, and was summoned to Parliament by it.

Time, which changes all things, has exercised its power over these baronies by tenure, for it is not alleged that more than three now exist; that is, Arundel, Abergavenny, and Berkeley itself. The law itself, as to dignities, has been greatly changed or modified from age to age, and we therefore need not be surprised if we find that of barony by tenure has itself, in the lapse of ages, changed its character.

I may draw the attention of the Committee to some of those changes to which I had occasion to call the attention of the House upon the question of life peerages. Coke's authority was then relied upon in favour of their validity; but this was overruled if it went beyond a title of honour, without any right to sit in this House. In 1479, Edward IV. created the Prince of Wales (afterwards Edward V.) Earl of March, during pleasure. Of course no such creation can be made at this day. Formerly the husband of a Peeress in her own right was entitled to the peerage during their joint lives. This was corrected by Henry VIII., with great legal assistance, because the dignity would shift from the husband on the death of the wife, which was thought objectionable. Still Henry decided that there could be tenancy by the courtesy *100 of the wife's dignity, where there *was issue inheritable to the dignity in analogy to a husband's right in his wife's real estate. But in the case of the Barony of Willoughby, this was decided otherwise.

Again, the right of a Peer to surrender his peerage to the Crown was established by many precedents, which had not been questioned; but in 1640, this House resolved that no Peer of this realm can drown or extinguish his Honor, neither by surrender, grant, fine, nor any other conveyance, to the King. And in the *Purbeck Case*, twenty years afterwards, a fine levied of the peerage to the King was held to be of no force. So a Peer could be degraded by the King for poverty; but Parliament alone can now degrade a Peer, and it is not likely that the power will ever be exercised simply for poverty. Upon a descent to females, the eldest was entitled, but the Crown could confer the right upon the husband of any one; now the dignity would be in abeyance, and the Crown can determine the abeyance only in favour of one of the co-heirs. These instances may suffice to show the changes which the law of Parliament in regard to dignities has undergone.

Before I call the attention of the Committee to the three dignities which have been relied upon as being baronies by tenure, it may be right to remind your Lordships, that barony by tenure has never been established by any resolution of this House; nor does any Peer now sit in this House merely as a baron by tenure. In regard to the Barony of Berkeley itself, we shall presently see that the supposed tenure has never been established; and that the last possessor of the baronial estate, having no other right to a writ of summons, retired from his attempt in this House to establish his right, and accepted a new barony by patent, which placed him upon these benches as junior Baron. In tracing the descent and title of the barony, we * shall find, that after * 101 the barony had vested in the Crown, under a settlement made by the Marquess of Berkeley, and when, upon the death of Edward VI. without issue, the estate itself reverted to the Berkeley family, the place in Parliament enjoyed of old with the barony has never again, as I understand the facts, been occupied in right of it, although the owner of the barony was actually a Lord of Parliament under a writ of summons, and had great favour shown to him.

In regard to *Arundel*, which was the case of an earldom, and not of a feudal barony (a distinction upon which I will not dwell), the writ of summons, of course, gave the right to sit, as in other cases, independently of the castle and honor. Spelman, in his Remains, page 13, observes, that he did not think it strange that

there was not at the entry of the Saxons a feudatory or hereditary earldom in all Christendom. "As for this, our Britain," he says, "the misery of it then was such as it was rather in an anarchy and chaos than in any form of government. Little better even in Alfred's days, through the fury of the Danes, though he at last subdued them for his time. Howsoever, three or four examples in five hundred years before the Conquest, differing from the common use, is no inference to overthrow it, especially in times unsettled and tumultuous. The noble Earldom of Arundel in our days of peace differeth in constitution from all the other earldoms of England. Yet that impeacheth not their common manner of succession."

Many remarks of importance would arise upon the Earldom of Arundel, if we are to examine it as a precedent. It appears that even the right in possession to a term of years dependent on another man's life, at a yearly rent, was held to carry with it the earldom. But the Act of Parliament[1] so far back as the 3 * 102 Car. 1, which, in * the enacting part, did not follow the preamble, but appears to have settled the title with the castle, and not the castle as carrying the title with it, and which created express limitations to heirs general, and created inalienable rights, prevents our relying upon the case of that earldom as an authority proving the existence of barony by tenure. The Act recites, that farther alienations might be made of the estates attached to the earldom, and that it was desirable to annex the hereditaments and titles of honour, mentioned in the Act, to the dignity of the Earl of Arundel, and to limit the succession of the dignity in the manner prescribed by the Act. The object was to annex the estates and the three baronies to the earldom, and to create a new limitation of the earldom. Clun and Oswaldestree were originally baronies by tenure, and the Fitzallans, as lords of those baronies, were Barons of the Realm. The baronial tenure had been destroyed by partition, yet the dignities themselves were preserved in all respects like that of the earldom, and all were limited to the same uses. This proves that the Crown and Parliament did not regard the tenure, but the possession of the property and dignities. The Barony of Maltravers also was settled in like manner, yet it was not a barony by tenure, and did not depend on the earldom. The

[1] C. 4 (private).

case of *Arundel* is not entitled to any weight in the present discussion.

Let us now consider the title of Abergavenny. When the question arose, in the time of James I. (1604), upon a contest between the daughter and heir of Henry, Lord Abergavenny, who died in 1587, claiming the title under the original writ of summons, and the nephew and heir male of the last Lord who was entitled to the Castle and Honor under a settlement made in the reign of Henry VIII., and he insisted that the barony was annexed to the Castle of Abergavenny, our Journals inform us, that "Forasmuch as, notwithstanding *all the allegations, arguments, reasons, *103 precedents, and proofs on either side, and the diligent observation of the same, the question, nevertheless, seemed not so perfectly and exactly resolved as might give clear and undoubted satisfaction to all the consciences or judgments of all the Lords for the precise point of right." But as both parties were capable and worthy of honor, they made suit to the King "for the ennobling of both parties, by way of restitution, the one to the Barony of Abergavenny, and the ancient place belonging to the same, and the other to the Barony of Le Despencer." To this the King agreed, but desired that the Lords should determine upon which of the claimants the Barony of Abergavenny should be settled; and thereupon it was resolved by the greater number of voices that the heir male should have it, which the King ratified by his writ of summons.

In this great case, then, the House, so far from deciding the question of barony by tenure, avoided, or rather declined to do so, and left it to the King to issue his writ of summons either to the heir general without the estate, or to the heir male with it. And although the majority ultimately selected the heir male, yet that was by the King's desire that they should select, and they had only the power to select one of the two claimants.

It has been argued that the King must have known that the Barony of Le Despencer could not be conferred on the heir male, and that therefore the Lords could not so allot it. But this is negatived by the very power given to the Lords. No doubt, as far as that authority warranted, the Lords could have allotted either of the dignities to either of the claimants. And so far from the Crown having any opinion upon the question of right, the Lords were required to make the selection without any restriction, after

they had remitted the question to the Crown. If the argu-
*104 ment *was well founded, the King would at once have selected the heir male for Abergavenny, instead of remitting the selection to the Lords. It seems clear that the strict question of right was disregarded by the Crown, which was desirous only, there being two baronies and two claimants, that each claimant should have one. The resolution was for restoration, but that was upon a division, and certainly was not founded upon any determination of the right to the Barony of Abergavenny as a barony by tenure.

In the "Report on the Dignity of a Peer" there is an elaborate review of the case of the *Earldom of Arundel.* It shows that in the petition, in the 11 Hen. 6, the claim of the earldom, as a dignity or name united and annexed to the Castle, Honor, and Lordship of Arundel, for time whereof the memory of man was not to the contrary, was a claim by particular prescription. And the report shows how difficult it would be to support that claim; and it states that it might be doubted whether the judgment itself in favour of the Earl did not operate as a severance of the dignity of Earl from the castle, honor, and lordship, if ever they had been united, so as to make it a personal dignity. In regard to the Act of 3 Car. 1, c. 4, the Committee observes, that the Legislature, in passing it, could not have examined the subject with much attention, or adverted to its probable consequences.

I may observe, that the *Fitzwalter Case* is objected to because it was before the Privy Council. But it was the opinion of the two Chief Justices Keeling and Vaughan, and Chief Baron Hale. And it is a singular thing that the King himself was present in person, with a very great assemblage of the first persons of the realm. Under the writ of summons, Lord Fitzwalter took his seat as junior baron; he was ultimately placed, with his consent, as the
*105 last Baron of Edward I., with a saving of his own *right, and also a saving of the right of all other barons. He had, therefore, the benefit of the ancient sitting, although he did not possess the barony.

I will now proceed with the Berkeley Peerage itself. Without inquiring earlier, yet from 1491, when the Marquess of Berkeley died without issue, there does not appear to have been any enjoyment of the barony as attached to the castle, a period of three hundred and seventy years. Till the death of Edward VI., in 1553,

the possession was in the Crown, under the Marquess's settlement, a period of sixty-two years. Maurice, the Marquess's brother, did not assume the title. His son Maurice was created a Peer by writ of summons, and sat in Parliament, as Dugdale states, as a new baron, in the lowest place, of which he had no joy considering the eminency of his ancestors and the pre-eminency which they ever had. The Chief Baron, and two others of his friends to whom he referred the question, took upon themselves to enter his name on the roll as junior baron; they advised him to accept the barony, although divers Lords, his friends, would have had him labour for the Lord Berkeley's room, to which, peradventure, he may have more convenient time hereafter than now. They say they give this advice for causes too long to write. The seat of the Berkeleys was vacant, and Maurice was seised of the reversion in fee of the castle, &c.; but not a word was said in relation to the barony. He died shortly afterwards, and his brother Thomas was in like manner created a Peer by writ of summons in 1530. He died in 1532, and his son Thomas sat in Parliament, and died in 1534; he had a precedence allowed to him, which, it is admitted, was only by favour of the Crown. When Henry, the son of the latter, in consequence of the death of Edward VI. without issue in 1553, became entitled to the Castle, &c., of Berkeley in possession under the * settlement, * 106 he was already a Baron, and entitled to sit as such, without depending upon any right in respect of the alleged barony by tenure; and he does not appear to have sat in the place of the old barony, but in a lower place than his successors have claimed.

From that period to this, a period of about three centuries and a quarter, no person appears to have sat in Parliament clearly in right of a barony by tenure, although several attempts have been made from time to time to establish the right, sometimes by claiming the precedence, and sometimes by claiming the dignity as springing out of or annexed to the castle, &c. We have seen how uneasy Maurice (No. 14 in the pedigree) was under his new creation; yet Henry (No. 16) did not sit in the ancient seat of the Berkeleys. George (No. 19) in 1661 expressly claimed precedence above Lord De la Warre. In 1660 the Act of Charles II. passed,[1] the proviso in which, it is asserted, was added to save this and

[1] 12 Car. 2, c. 24.

other baronies by tenure; yet George allowed the matter to drop till 1670, and then placed his claim higher than he did before; but no resolution was come to, and nine years afterwards he was created a Viscount and Earl; but no mention was made in the grant of the castle or honor. And thus it continued down to the death of the last Earl of Berkeley in 1810.

The late Earl Fitzhardinge, thirteen years after having acquired possession of the castle and estates of Berkeley under his father's will, claimed the barony by tenure. In 1829 and 1830 evidence was produced before a Committee of this House; but no farther steps were taken, and in 1831 he accepted a grant from the Crown of a new barony, as Lord Segrave, and of course took his place, and sat as junior baron; ten years afterwards he was *107 created *an Earl. Upon his death without issue, his brother, the petitioner, as tenant for life under his father's will, now revives the claim which the late Earl appears to have abandoned when he obtained a new barony by patent. This, I believe, is the short history of the Berkeley Peerage, as far as the Committee is called upon to investigate it.

It may now be convenient to consider what have been the opinions of learned persons, and of this House, with regard to the existence of barony by tenure in the ample form in which it is now claimed.

Selden,[1] after explaining how baronies by tenure had become in part abusively called baronies, by reason of the ancient application of that word to them before the latter part of King John's reign, and were in truth estimable but as knight's fees only, which were not honorary baronies, observes, that "the like is to be said of the baronies that were of the honorary possessions of the ancient barons, and have been aliened by them; for though these often have retained the name of baronies in other hands, yet they were so styled but in regard of their being in truth honorary baronies formerly; and their barons became upon such alienation also barons by writ only (retaining their ancient place and dignity), because their possessions were gone which at first made their ancestors barons by tenure."

The petitioner himself states, that although most of the territorial dignities were extinguished by partition between co-heirs, in some instances they failed by alienation, and the Crown in a few

[1] Tit. Hon. c. 5, § 22.

cases continued to summon the person who had previously sat as a baron by tenure after he had alienated the territorial barony, or a sufficient portion of it to destroy its character an as entire barony; and in such * cases, although the person summoned * 108 became a baron by writ only, he was allowed to retain the precedence in which he had previously sat. De Ros, Le Despencer, and Fitzwalter are said in the statement of the petitioner to be instances.

In the *Abergavenny Case* in this House in 1604, Serjeant Doderidge summed up the objections made to the existence of barons by tenure, which were, 1. That the grantee must hold, like his feoffor, *per Baroniam*, which, if he were ignoble, would make him noble, which was absurd; 2. That many manors, which in former times were held *per Baroniam*, were then in the possession of mean persons who never claimed the title of baron; and, 3. That there were some ancient barons who had sold their castles, and yet retained their dignities.

The Serjeant then answers these objections: 1. That an alienation by a baron by tenure was a forfeiture, and the King seized, and so the dignity was extinguished. 2. It was true that ancient baronies were in the hands of men ignoble; but the reasons were twofold, first, because they had been aliened by license to them; secondly, because such manors had come to the Crown by way of reversion, escheat, or forfeiture, and were granted again, reserving other services. To the third objection he answered, that such baronies were created by writ, in which the persons summoned were named by the principal place of their abode; and therefore, though they had aliened their castles or manors for which they were named, yet they retained their dignities.

In "The Magazine of Honour," by Bird, but perused and enlarged by Doderidge, and published in 1642, the arguments just referred to are introduced as original matter without any reference to the *Abergavenny Case*. The point concerning alienation is, however, better stated: "If a * baron by tenure alien the * 109 manor, &c., holden by barony, unto a mean person not capable of Honor, and that by sufficient license so to do, and after, the alienor be called by writ to the Parliament under the title, or as baron of such honor, &c., so aliened, he is not any more a baron by tenure, for he has aliened that which was held by barony; but after such writ of summons he is become a baron by

writ, and may retain the name of baron by title of the place, for the writ gives him that addition of name and dignity." This no doubt is correct; but the first part of the statement assumes, that although the alienation was by license, yet the alienor must be capable of Honor in order to enable him to sit. And of that capacity no doubt the Crown was to judge. This indeed was admitted in the argument before us at the bar.

Chief Justice Crew, in delivering his opinion on the Earldom of Oxford, in this House, in 1625, quoted instances of conveyances of baronies; and observed, that "the persons to whom they were conveyed held these earldoms and baronies, and were earls and barons accordingly, having the castles and manors, and being of the blood, and the heirs general by such conveyances were excluded. But if these castles and manors, being local, had been conveyed to strangers of blood, they should not have been earls or barons." So that at that very distant period this very learned person, in that elaborate discourse, expresses his opinion that, in order to transfer the castle and honor, and right to sit in this House, there must have been a transfer to a person of the blood.

In 1640, in this House, concerning the titles of the Baronies of Hastings and Ruthyn, where it was the unanimous opinion of the Judges that there could not be a *possessio fratris* in point of honor, upon somewhat which was spoken of in the argument con-
*110 cerning a power of conveying *away of honor, it was resolved, *nem. con.*, "That no person that hath any Honor in him, and a peer of this realm, may alien or transfer the Honor to any other person; and also, that no peer of this realm can drown or extinguish his Honor (but that it descend to his descendants), neither by surrender, grant, fine, nor any other conveyance, to the King." The House at that day would hardly have held that a transfer of a baronial estate would carry with it the right to sit in Parliament.

In 1669, in the Privy Council, upon the Barony of Fitzwalter (Coll. 286), where the King himself was present, with the assistance of Chief Justice Keeling, Chief Justice Vaughan, and Chief Baron Hale, one of the counsel insisted that it was a barony by tenure, and ought to go with the land, which point was about to be argued. Upon which the parties were ordered to withdraw, "and the nature of a barony by tenure being discoursed, it was found to have been discontinued for many ages, and not in being, and so

not fit to be revived, or to admit any pretence of right of succession thereupon," and that "the pretence" (I beg your Lordships' attention to these words) "of a barony by tenure being declared (for weighty reasons), not to be insisted upon;" then the counsel were heard on another point.

Madox, who wrote in 1741, denies that if a commoner should purchase the Honor and Castle of Arundel, he would straightway become Earl of Arundel without any creation. "No man, or number of men, without the King," he says, "can or ever could make an earl or baron. To grant a baronial title is an act of regality inseparable from the Crown, and never yet communicated to subjects. In the first place, when land baronies were in being in England, a license from the Crown was necessary, and homage and seisin of the Honor from the King's hand." And he adds, that "there never was (for aught that I knew) an * instance of * 111 any man's coming into seisin of an Honor by purchase or contract made with a subject." So that you have a succession of great authorities, all entirely agreeing upon this point.

But what answer can be given to the Book on Tenures by our famous Judge Littleton, who died in the reign of Edward IV. His book is strictly upon Tenures, and he explains them all: Frankalmoigne, Grand and Petit Serjeanty, Escuage, Knight-Service, and Socage, and incidentally Homage and Fealty. But not a word (as I think was observed by the Attorney-General at the bar) about Tenure *per Baroniam*. This silence carries with it more authority than even a chapter by his masterly hand, showing how the tenure had ceased, would have done.

Madox finds great fault with Littleton: "the worthy gentleman" (as he calls him,— one hardly knows the great Littleton by that appellation), for his definition of "Escuage," but consoles the student by assuring him that he will find the subject explained in a more clear and solid manner in his "History of the Exchequer." But even he admits that the "Tenures" is "a classical book."

I do not find, in any of the public Acts of Parliament relating to the tenures of the Crown, any reference to tenure *per Baroniam* by that name. The 1 Edw. 3, c. 13, relieved purchasers when the lands they had purchased were holden of the King, as of honors, and had been taken into the King's hands from the purchasers, as though they had been holden "in chief of the King as of his Crown," and the 1 Edw. 3, c. 12, relieved against a forfeiture,

by alienation without license, of lands "holden of the King in chief." And the statute *De Prærogativâ Regis* (17 Edw. 2) deals with the King's tenants *in capite*.

It is suggested in the Report upon the Dignity of a Peer, *112 that as, under the 1 Edw. 3, c. 12, the King was *bound to accept a fine, the tenants *in capite* could aliene without the King's consent, and sell the Parliamentary dignity, paying a fine. But no such consequence followed; and as the fine was to be taken by due process in Chancery, no doubt a sufficient check existed to prevent any abuse of the right. But it may be thought to show that the alleged right, as annexed to tenure *per Baroniam*, was not known to the framers of the Act.

But to resume. The 1 Edw. 6, c. 4, §§ 1, 2, was passed to remove doubts about tenures under the Crown. All honors, castles, manors, &c., holden of the King by knight-service, socage, or otherwise, as of any of his dukedoms, earldoms, baronies, castles, manors, &c., which came or should come to the Crown by attainder, or conviction, or by dissolution of monasteries, should not be adjudged to be holden *in capite*, or as tenure *in capite*. But the King's rights were saved as to honors, &c., held of the King in chief, as of his person, or of any other his ancient possessions, and being not come to the King by any such attainder or dissolution.

The 32 Hen. 8, c. 1, and the 34 & 35 Hen. 8, c. 5, which gave a partial power of devising lands, speak of knight-service in chief of the Crown, or of that nature; socage, tenure in chief, or of that nature, and of knight-service held of any other person, and of knight-service of the King, and not in chief, and of socage, but not of any tenure *per Baroniam*.

I have now, my Lords, taken a general view of the objections to the petitioner's claim. It remains for me to draw your attention to the Statute of Charles II., abolishing tenures. But I must first refer to what passed at an earlier period, as a key to the intention of the latter Act. As early as the reign of James I., Parliament entered upon the question of tenures. The Commons re- *118 quired that *knight-service generally might be turned into free and common socage. They proposed that in grand serjeantry, though the tenure were taken away, yet the service of honor should be saved, wherein the tenures *per Baroniam*, as it might concern bishops and barons, or men in Parliament, were to be considered. There the tenure is expressly mentioned. The King's

answer, on the 20th April, 1610, was, that he would on no terms depart with any part of his sovereign prerogative, whereof the tenure *in capite* of his person, which was all one as of his Crown, was no small branch. The dependents upon such tenures, viz., wardship, &c., he would contract for when he knew the recompense to be offered to him (the honor and tenures being reserved). This House ordered the two Chief Justices to declare whether the tenure of honor aforesaid may be reserved to the King, and the matters of charge be released, which they, with their reasons, answered in the affirmative. This was followed up by a memorial of the Commons to the Lords, by which they proposed to get rid of all tenures by knight-service, all to be taken away. Grand Serjeanty, though the tenure be taken away, yet the service of honor to remain. Homage to be taken away, only the coronation homage to be saved, not in respect of tenure, but of honor. And the tenure *per Baroniam*, as it might concern bishops or barons, or men in Parliament to be considered. Here again the tenure is mentioned. The Parliament was shortly afterwards prorogued, and the subject was considered in the following session, but no legislation took place. It was called the Grand Contract; and there was much squabbling between the King and the Commons about the price to be paid. Upon one occasion, his Majesty desired a night to sleep upon his intended offer. Nothing can be more distinct than the demand, and the qualified and conditional acceptance. The Commons required the absolute * destruction of all military * 114 tenures, and the general adoption of free and common socage, reserving, but not as incident to tenure, certain honorary services, and the right of the bishops and barons to continue to sit in Parliament. On the other hand, the King was willing to part, for a due consideration, with the profits of tenures, but expressed a determination not to part with the tenures themselves.

Thus the matter rested until 1643, when, as it appears in Whitelock's Memorials, a committee was appointed on the motion of Selden, to prepare an ordinance to take away the Court of Wards and Liveries, and the subject of its jurisdiction. In 1644 the bill was read a first and second time. And in 1645, upon debate, opened by Selden, Maynard, and John Whitelock, and other lawyers, the House voted an ordinance, that the Court of Wards itself, and all wardships, tenures, and licenses for alienation should be taken away; and the Lords concurred therein. This ordinance contained

no saving of the rights of peers by tenure; but whether such a saving was omitted because the learned lawyers of that day held that no such tenures then existed as carried the right to sit in the Lords' House, or, as suggested by the petitioner, because the law then recognized no sovereign to whom honorary services could be performed, and no Peers whose seats could be preserved, I must leave your Lordships to determine; certainly, baronies by tenure were not mentioned.

But to proceed: in 1648 the kingly office was abolished by Parliament, and in 1648–9, the House of Lords was abolished by the Commons, upon a division of forty-four against twenty-nine; and it was provided that no Peer not elected should have any privilege of Parliament, either in relation to his person, quality, or estate. These Acts are in Scobell. In 1649 the nation was declared to be a Commonwealth, without any King or House of Lords; and * 115 * the two Houses were constituted according to Cromwell's fashion. And in 1656, after renouncing the title of the late King, an Act was passed (which is in Scobell), for taking away the Court of Wards and Liveries. This was by way of confirmation by the Protector and Parliament. It recited the former Act, which on the 24th February, 1645 (a date which your Lordships will see to be material), took away the Court of Wards, &c., and turned into common socage all tenures by knight-service, either of the King or others, or by knight-service *in capite*, or socage *in capite* of the King. It then proceeded again to abolish the Court of Wards, &c., and to take away all tenures *in capite*, and by knight-service of the late King, or any other person, and all tenures by socage in chief, and to turn into common socage all tenures.

Thus, these important questions of tenure practically stood at the Restoration. It was found impossible in 1660 not to confirm and continue the abolition of tenures as from 1645; and one of the first Acts of the King was 12 Car. 2, c. 24, "for taking away the Court of Wards and Liveries, and tenures *in capite*, and by knight-service and purveyance, and for settling a revenue upon his Majesty in lieu thereof." After reciting that it was found by former experience that the Court of Wards and Liveries and tenures by knight-service, either of the King or others, or knight-service *in capite*, or socage *in capite* of the King, had been burdensome to the kingdom, the Act proceeded to take away, from the 24th February, 1645 (which was the date which had been fixed by

Cromwell and the Parliament), the Court of Wards and Liveries, and all wardships, &c., by reason of any tenure of the King, or of any other by knight-service; and also to take away, from the same day, all fines for alienation, seizures, and pardons for alienations, tenure by homage, and all charges incident for or by reason of wardship, * &c., or tenure by knight-service, escuage, &c., *116 all other charges incident thereto.

The Act then takes away and discharges all tenures by knight-service of the King, or of any other person, and by knight-service *in capite*, and by socage *in capite* of the King, and the fruits and consequents thereof. And all tenures of any honors, manors, lands, tenements, or hereditaments, or any estate of any inheritance at the common law held either of the King or of any other person or corporation, are from the said 24th February, 1645, turned into free and common socage.

And the same are thereby forever discharged of all tenure by homage, escuage, voyages royal, and wardships incident to tenure by knight-service; and values of marriage, &c., and all other charges incident to tenure by knight-service; and from certain other charges; and all tenures thereafter to be created by the King, his heirs and successors upon any gifts or grants of any manors, &c., of any estate of inheritance at common law, are directed to be in free and common socage only, and not by knight-service, or *in capite*.

It is then provided by Section 7, that the Act shall not take away tenures in frankalmoign, nor alter copyholds, nor take away the honorary services of grand serjeanty other than of wardship, marriage, escuage, voyages royal, and other charges incident to knight-service.

The Act then proceeds to provide for the custody of children during their minority, and the management of their lands. These, no doubt, were amendments introduced in an improper place; but then Section 11 provides that the Act shall not infringe or hurt any title of honor, feudal or other, by which any person had or might have right to sit in the Lords' House of Parliament, as to his or their title of honor, on sitting in Parliament, and the privilege belonging to them as Peers.

* I may for a moment relieve this dry discussion by quot- *117 ing to your Lordships the observations of the Speaker of the House of Commons in addressing the Crown on the dissolu-

tion of Parliament. He told the King that this Bill, *ex re natâ*, might properly be called a bill of exchange, of course, because certain considerations were paid for it; but they were not a full compensation for such royal prerogatives and ancient powers of the Crown. More was implied: "for, Royal Sir, your tenures *in capite* are not only turned into a tenure in socage (though that alone will for ever give your Majesty a just right to the labour of your ploughs, and the sweat of our brows), but they are likewise turned into a tenure *in corde*. What your Majesty had before in your Court of Wards you will be sure to find it hereafter in the Exchequer of your people's hearts." He then compared the King's new revenue with the King of Spain's mines, which had bottoms; which comparison, if the Spanish King had heard it, would, no doubt, have sensibly affected him.

My Lords, upon comparing the Act of Charles II. with the Ordinance of Cromwell and the Parliament, it will be found that they correspond in abolishing the same tenures, and in turning all tenures into common socage, although there are more provisions in the Act of 12 Car. 2, which were occasioned by the Restoration; there were then, as now, a King and a House of Lords. To me the operation of this Act seems so clear, that I should have spared your Lordships the examination of the general subject, if doubts upon the true meaning of the Act had not been expressed by learned men. My own clear opinion is, that if baronies by tenure existed, with the consequent right to sit in this House, at the Restoration, the Act under consideration for ever extinguished them, and all other military tenures. I know no terms which could more distinctly have that operation than the very
* 118 terms of the Act. Not only were all tenures * *in capite* (amongst which tenures *per Baroniam* are clearly included) taken away, but the lands were for ever turned into free and common socage. How can the castle and estate of Berkeley, holden as it now is by free and common socage, and not *in capite* or in chief, carry with it a right in its possessor to sit in this House? It confers upon him just the same right, but no higher than the humblest cottage held in fee confers on its owner. The feudal tenure being abolished, of course the privileges annexed to or flowing from it have ceased. It was therefore necessary expressly to save the right still to sit in Parliament to such Peers, if there were any, which I apprehend there were not, whose right

depended upon any of the tenures which were taken away. But to carry the saving in the Act farther, and to hold that it continues the very thing which it has destroyed, namely, the feudal tenure, would be not to construe the Act, but to frame a new one. It would be wholly inconsistent with both the expressed intention and the clear enactments of the Act. Nor is there the slightest reason for such a violent construction. By giving to the enactment abolishing for ever feudal tenures, and to the subsequent saving of the right of Peers to continue to sit in this House, their natural construction, the whole object of the Legislature will be accomplished without detriment to any one. The right to sit is saved, but it no longer depends upon the tenure which is extinguished. The title of honor was left as a substantive personal right. The tenure was not saved in the particular instance in order to save the title of honor, but the title of honor was itself saved although the tenure was destroyed. This does no violence to the Act, but gives to it a harmonious operation, and to every clause in it its legitimate effect. The Legislature knew well how to save a tenure, where such was the intention, and therefore the tenures by frankalmoign and the baser tenure by copy of Court Roll were expressly * saved. The Act found * 119 the Lords' House of Parliament filled by Peers sitting with inheritable blood, and it effectually saved their right. This House has consequently ever since (a period of two centuries) been constituted of Peers claiming either under an original writ of summons or by patent. No man has sat here under a simple right depending upon the acquisition of a baronial estate. A decision against the petitioner would only leave the House in the condition in which it has existed for centuries. This view, no doubt, would exclude the petitioner, for whatever may be the construction as to the line of heirs entitled under the saving, he does not claim under the line, for his claim rests only on the seisin of the castle and estate of Berkeley, which, in my opinion, is now held by him in free and common socage.

There is, indeed, I apprehend, a Barony of Berkeley, not depending upon tenure still existing, if there is any heir to claim it. If the petitioner were to establish his claim, there might be two Barons of Berkeley sitting here at the same time, one as a baron by tenure, and the other as a baron by writ of summons. And

besides, if the petitioner's right be established, he might, after being summoned to this House, sell the baronial estate, if such it be, of his own mere motion, and I suppose retain his seat, and yet confer on any purchaser, of whatever degree, a right also to sit here; and I know not what restraint could be put upon repeated alienations, and new claims under them. If his right be rejected as not founded in law, all will be well. He, two hundred years after the Act of Charles II., asks a declaration of his right to sit in this House under the saving in the Act, although, nine years after the Act passed, this House, as we have seen, found that the tenure upon which he relies had been discontinued for many ages, and not in being, and so not fit to be revived, or to admit * 120 * any pretence of right of succession thereupon. It was not at that period thought, when the subject had been so recently thoroughly considered, that the Act had been required in order to extinguish the right to sit under a barony by tenure, for the right had not existed for many ages, and still less was it supposed that the saving in the Act, which must have been known to the House, revived the tenure. After a lapse of two more centuries, we could not safely take a different view. And here I should leave the case, were it not that the due construction of the Act puts an end to all possible doubt upon the petitioner's title, even assuming, contrary as it seems to the fact, that tenure *per Baroniam*, with its consequences, did exist up to the time of passing the Act of Charles II. But, in order to establish the true construction of the Act, I must endeavour to answer the objections which have been raised against that construction.

Madox, in his "*Baronia Anglica*," observes, that the Act was, by the title of it, for taking away tenures *in capite* by knight-service, &c., and he says, that by very ill luck the penner of the statute put in the words "tenures *in capite*," which words had basely entangled the subject-matter, and rendered the statute in some measure illusory. To enact that there shall be no tenure *in capite* was, in his apprehension, an incongruity. He thought that tenure *in capite* could not be taken away without taking away not only knight-service, but all other tenures too. For, if a man holdeth of the King in socage immediately, or *sine medio*, he is really the King's tenant *in capite* in socage, whether we call him tenant *in capite* or not. Madox denies that tenure *in capite* is a distinct tenure. But all the authorities treat it, and the precedents

show it to be such, although it may be of land held in knight-service, or in socage, for example. Madox quotes a plea, which he sets * forth, that a manor was holden of the King * 121 *in capite*, as of the Honor of Boloigne, whereof he says, that the manor was holden of the King immediately. No doubt it was, but still in that instance the manor was "holden of the King *in capite*," and homage rendered. The 1 Edw. 3, c. 12, as we have seen, in saving forfeiture, and imposing a fine on alienation without license, speaks only of lands holden of the "King in chief," as all, Coke says, which are held by grand serjeanty are. And chapter 13 of the same year provides relief for purchasers where lands holden of the King as of honors have been taken into the King's hands from purchasers, as though they had been holden in chief of the King as of his Crown. The distinction is clearly shown in Rolle's Abridgment.[1] It is there said that it was resolved in the Court of Wards, that where the King granted lands to hold of any of the ancient honors by service of chivalry, and not *in capite*, that is a tenure as of the honor, and not a tenure *in capite*. If the King gives land, to hold of him as of an honor or manor, which is not one of the ancient honors, that is not a tenure *in capite*. Madox quotes many grants by Elizabeth to hold of the manor of East Greenwich by fealty only, in free and common socage, and not *in capite*; the latter words, he says, are repugnant to the former, and therefore the tenure, if any, reserved to the Crown by these patents was, in truth, tenure *in capite* by socage. This assertion appears to be without foundation; the lands were holden immediately of the Crown as of the manor in socage, but not *in capite*.

The distinction between an immediate holding of the King, and yet in socage and not *in capite*, and a tenure of the King *in capite*, and the consequences of the two tenures, is too well established to be unsettled by such * frivolous objections; nor * 122 should I advert to them, were it not that they are made the foundation of an attack on the Statute of Charles II. Madox tells us, that no tenure was in greater esteem than knight-service; he might, he says, except barony, but he need not, for barony was knight-service embaronied, that is, knight-service erected into a barony, or, if you please, made a barony at its first creation. The tenure was abolished, or intended to be abolished, by the Statute of

[1] 2 Rolle, Abr. 504, pl. 8, 10.

Charles II. In support of this doubt upon the operation of the statute, he gives no reason whatever. On the contrary, he makes an observation which shows how perfectly the Act was framed for the object in view. He says some estates were baronial, that is, holden by barony and knight-service; others chivalerian, that is, holden by knight-service only. Without knight-service, tenure by barony could not subsist, for which reason we may fairly say that by taking away knight-service, tenure by barony is virtually taken away. So that he answers his own objection in the most conclusive manner.

Cruise, a useful, but not very accurate writer, quotes the latter observation from Madox, and adds, "But if baronies be held by grand serjeanty, this observation is not well founded," and he supposes it probable that Madox was not acquainted with the saving in the Act of Charles II.

Some observations in the Report on the Dignity of a Peer are entitled to more attention. It is there said that the Act of Charles II. contains a proviso that it shall not take away the honorary services of grand serjeanty. If, therefore, the attendance of a Peer on his Sovereign at his Councils and in Parliament is to be considered as a service of grand serjeanty, as some have contended, and as an honorary service of grand serjeanty, within the meaning of the Act, which seems far from clear, the service is *123 preserved, * but the tenure of the land is common socage, and the power of alienation free. It may be doubted, however, whether the attendance of a Peer on his Sovereign at his Councils and in Parliament, can be deemed as honorary service, intended to be preserved by this Act; and if not, the Act having discharged all tenures in chief of the Crown, except tenure in common socage, has put an end to tenure *per Baroniam*, whatever may have been its nature. It is indeed observable, as the report adds, that tenure *per Baroniam* is not mentioned in the Act, and perhaps it may be inferred that the Legislature did not then acknowledge the existence of tenure *per Baroniam* as distinct from knight-service.

Littleton, in his chapter on Grand Serjeanty, distinguishes it from tenures by escuage, and shows that the services of grand serjeanty are to be done by the tenant in his proper person, and gives many instances; as to carry the banner of the King, or to carry his sword before him at the Coronation.

Madox tells us that some kinds of serjeanty were like unto knight-service, and some which had no kind of knight-service belonging to them, *e.g.*, the serjeanty of finding a cook at the King's Coronation to dress victuals in the King's kitchen. Madox furnishes some curious services; for example: A manor was held of the King in chief by serjeanty of being Mareschal de Meretricibus (I will not shock your Lordships with Madox's translation) in the King's household, and of dismembering malefactors condemned, and of measuring the gallons and bushels in the King's household. Land was held of the King *in capite* by the service of holding the King's head in the ship between Dover and Whitsand, when the King went over the sea there, which service was found to be grand serjeanty. Most of your Lordships who have crossed * from Dover, would probably prefer a simple stew- * 124 ard for the duty, to a grand serjeant holding *in capite*.

But, what is more to the point, Littleton lays it down, and none disputes it, that all which hold of the King by grand serjeanty, hold of the King by knight-service, and therefore, of course, the tenure, if it still existed, was extinguished by the Act.

The right and duty to attend the King in Parliament was not more attached to grand serjeanty than to knight-service *in capite*. Coke says, that in ancient times every barony was held by grand serjeanty; and in *Cromwell's Case*,[1] and *Sir Drew Drury's Case*,[2] and in Coke Littleton,[3] he refers to *Clifford's Case*,[4] for his authority. But, upon referring to the Year Book, I find no such statement, nor indeed is the tenure apparent. In Brooke's Abridgment,[5] the case is stated with another *quod nota: "Et uncor non patet que ceux tenements fueront tenus del roy;"* and in Rolle's Abridgment,[6] the case is stated, but no notice is taken of the tenure.

In *Cromwell's Case*, Coke gives the reasons why he collected that the land was held in grand serjeanty, which, however, are by no means convincing. But the main point is, that tenure by grand serjeanty was a tenure by knight-service.

Now, then, let us once more turn to the Act. It expressly extinguishes knight-service of every degree, and of course, therefore, grand serjeanty, which, with the view we are now taking of the

[1] 2. Rep. 80.
[2] 6 Rep. 74 *a*.
[3] 222 *a*.
[4] Lib. Assis. an. 18, pl. 18.
[5] Tit. Conditions, pl. 105.
[6] 1 Rolle, Abr. 438, pl. 1.

question, could not exist without knight-service. This clearly was the intention. The framers of the Act were aware that they had abolished all tenures except free and common socage, * 125 and they knew how to reserve * out of the sweeping enactment of abolition the particular tenures which they wished to preserve, and the services, but not the tenure itself, of another tenure. Section 7, accordingly, saves the tenures of frankalmoign, and by copy of Court Roll, and (not the tenure, but) the honorary services of grand serjeanty, other than wardship, marriage, escuage, voyages royal, and other charges incident to knight-service. This saving, of course, shows, that the Legislature considered that grand serjeanty was extinguished as a tenure by the former part of the Act. The saving was manifestly of such services as I have already pointed out, and had no reference to the right to sit in Parliament as annexed to a tenure *per Baroniam*. This clearly appears by the 11th section, which saves any title of honor, feudal or other, which gave a right to sit in this House; for when such a pre-eminent right was intended to be reserved, it was saved expressly, and not as honorary services generally. And if baronies were held by grand serjeanty, and if the saving of the honorary services of grand serjeanty preserved the right to sit here, then the 11th section was surplusage, for nothing in the Act could possibly affect that right when Peers sat under general writs of summons, or under patents.

My Lords, I was curious to see how the point upon the saving in the Act was treated at this bar upon the claim by the late Earl. It was argued, that the claimant had no interest to contend, that the abolition of military tenure did not sweep away, with the rest, the holding *per Baroniam;* but that, whilst the Act abolished the tenure, the right of being summoned to Parliament was, by express terms, saved, and in terms to indicate that it was saved as incident to, and as it were parcel of, the tenure *per Baroniam*. The tenure itself was extinguished, but the right of barony by tenure was recognized; the right of barony by tenure to the * 126 privilege of Peerage and Parliamentary privileges * was expressly saved by that statute. This argument shows how impossible it is to construe the Act so as to save the right as a right attached to the barony by tenure, when the tenure is for ever destroyed; still the right to sit is reserved, but no longer as owner of the Castle and Honor.

In every possible view, therefore, I submit to the Committee that we are bound to consider the Act of Charles II. as having extinguished altogether the tenure under which alone the petitioner seeks to establish his right to sit in this House.

LORD CHELMSFORD.—My Lords, my noble and learned friends who have preceded me have gone so fully into the important question before the Committee, that I might have contented myself with a simple expression of acquiescence in their opinions, if I did not feel that the learning and research which have been displayed in maintaining the claim deserve a more particular notice.

It seems to me, also, that, as an opinion has popularly prevailed that a few baronies by tenure have survived to the present day, it is desirable that, upon the first opportunity which has presented itself of deciding upon such a claim, its foundations should be carefully examined, to discover whether it stands upon any substantial ground which is capable of supporting it. No occasion can be imagined better adapted to bring the question to a test than the assertion of the present claim. It is founded entirely upon a transfer, by will, of the castle and possessions which are said to have constituted the ancient Barony of Berkeley, under which will the claimant is in possession as tenant for life; and upon this ground alone he claims to be entitled to a writ of summons to Parliament as Baron of Berkeley.

* The peculiar nature of the claim thus asserted imposes * 127 upon the claimant the necessity of establishing, first, that the castle and lands of which he is in possession under the will, were originally held by a tenure which conferred upon their owner the right to be summoned as a Baron to Parliament; secondly, that this right is so inherent in the lands, that, upon their alienation, it passes with them as an inseparable incident to the alienee; and, thirdly, that this inherent power of dignifying the owner has adhered to these lands uninterruptedly to the present day.

In the endeavour to establish these essential positions, a great deal of learning and ingenuity have been displayed, which have, in the end, left many important parts of the subject in great and inevitable obscurity. The proof of the claim rests, in no inconsiderable degree, upon ascertaining the incidents which originally belonged to the ancient tenure *per Baroniam;* and yet, after all the industry employed upon the subject, it is left in a state of un-

certainty, which is most embarrassing to the present investigation. That anciently lands were held by a description of tenure called tenure *per Baroniam*, has been clearly established, but the exact nature of that species of tenure, and its distinguishing characteristics, are nowhere distinctly and certainly defined. Even such a fact as whether any certain number of knights' fees were necessary to constitute a barony cannot now be ascertained upon any sufficient authority.

The statement of Spelman, derived from the unauthentic compilation called *Modus Tenendi Parliamentum*, that the *Baronia* anciently designated thirteen knights' fees, and a third part, cannot be relied upon. There is abundant proof that a barony might own the service of a much smaller number of knights than thirteen. The tenure *per Baroniam* has been generally regarded
* 128 as nothing more than a tenure * by knight-service; and yet, if it was in itself a distinct and peculiar tenure, it seems extraordinary that it should not once have been noticed by Littleton throughout his book on tenures. But some known distinction must have existed between tenure by barony and ordinary knight-service, as the relief of the heir in the two cases was different; the Knight paying only one hundred shillings for his relief, but the Baron one hundred marks; and exactly the same amount of relief was due from the heir of the Baron, whatever number of knights' fees the barony contained.

There must, therefore, have been something in the terms of the original grant to indicate the nature of the tenure in respect of which the relief was to be paid.

The counsel for the claimant maintained, that a tenure by barony differed from an ordinary tenure by knight-service in respect of the tenant having, as incident to his tenure, the privilege of being a member of the Great Council of the nation, and that it was in consequence more properly a tenure in grand serjeanty, although the service due might only be the military service of a certain number of knights. The Attorney-General, on behalf of the Crown, more than once challenged the claimant to produce some distinct authority for his often repeated assertion that there was involved in the words "*tenendum per Baroniam*" a right of demanding a summons to Parliament. The argument of the claimant upon this point was involved in great uncertainty. He sometimes put the attendance in Parliament as a mere incident to

the tenure, and at others as a service due from the tenant which gave the distinctive character to the tenancy, so that it would cease to exist if the right to sit in Parliament were severed from it. But this latter view is inconsistent with the idea of a summons to Parliament being the right of the tenant. A service reserved confers no privilege, but only imposes an *obligation; and *129 as it is a duty to be performed to the Lord he might dispense with it by not issuing a summons for the attendance of his tenant. If the claim is put upon the ground of a service it must have been the subject of a reservation in the grant creating the barony. And yet, important as such a document would have been, no instance of a grant of lands to hold *per Baroniam* with a reservation of the service of attending the King in his Parliament has been discovered. The claimant is, therefore, driven to maintain the right as having been an inseparable incident to any barony by tenure. But the evidence which he has brought forward in support of this view falls far short of its object, if it does not tend to an opposite conclusion.

There is a difficulty which meets us throughout this inquiry, from an inability at this distant period to distinguish between duties which resulted from the feudal relation, and rights and privileges which originated in the political relation, of the tenant. Originally all the King's tenants *in capite* who held by knight-service were indiscriminately called his Barons, and were all equally bound by their tenure to do suit and service in their Lord's Court, the *Aula* or *Curia Regis*. But from the earliest times after the Conquest there was a *Commune Concilium*, or Great Council, consisting of persons, generally the principal tenants of the King, summoned at his discretion to advise him upon the affairs of the kingdom, and which was usually assembled at the same time as the *Curia Regis*. Thus, after the lapse of years it would necessarily become extremely difficult to distinguish between the attendance in the King's Court in the performance of a tenant's duty, and the attendance upon special summons at a Council assembled at the same time and place. The apparent equality originally existing amongst the King's tenants *in capite* soon disappeared, and before the time of Magna Charta a distinction had been established *amongst them, and a portion of them had become *130 known as a distinct class by the appellation of *Majores Barones*. This description is in itself vague and indefinite, but

from the use of it in Magna Charta, without an attempt at explanation, it is evident that it must have been at that time a well-understood distinction.

It has been supposed, as was suggested in argument, that before this period, "it had been settled by the law of some other Parliament, how these greater Barons should be distinguished from the lesser tenants in chief." But I see no necessity for such a supposition, for the distinction seems to be almost involved in the difference between the two classes of the King's tenants *in capite*, viz., those who held *per Baroniam*, and those who held by ordinary knights-service. And supposing this view to be correct, there could have been no difficulty in ascertaining the class of *Majores Barones*, as the relief which they paid would at once show whether they held *per Baroniam* or not. But whatever may have been the origin of the distinction, or whatever the class of tenants comprehended within the description, it appears from Magna Charta, which may be considered to have been declaratory of rights that previously existed, that a practice had prevailed of issuing a special summons to the class of tenants distinguished by the title of *Majores Barones*, to attend the Council when any extraordinary aid was to be obtained, the rest of the King's tenants *in capite* receiving only a general summons. Although considerable stress was laid upon this provision in the Great Charter, it does not appear to me to furnish much assistance in the investigation of the claim.

If it is said that the special summons which the *Majores Barones* were to receive was in respect of the tenure of their lands, it may be observed, that the lesser tenants in chief were equally
* 131 entitled to be summoned. A certain * superiority is conceded to the *Majores Barones*, indeed, by the King's writ being issued to them while the rest of the King's tenants *in capite* were to be summoned by the sheriffs and bailiffs. But all were to be summoned, either separately or generally, and all had an equal right to attend at the day and place named. There is nothing in all this which indicates any peculiar privilege attached to the tenure of the *Majores Barones* as to attendance in Parliament. In substance, all the tenants *in capite* had an equal right to be present; the distinction consisted merely in the mode of summoning, which was nothing but form. Any argument, therefore, in favour of the right to be summoned to Parliament by reason of the tenure

of land, which can be drawn from this article of Magna Charta, must apply equally to all the King's tenants *in capite.*

It seems extraordinary that this article of Magna Charta should not have been repeated in the Charter of Henry III., which was passed in the following year. And in subsequent charters, there is nothing to be found on the subject of summoning the *Majores Barones* to Parliament, nor any recognition of such an obligation.

This would have been of no great importance if it could have been shown that, after Magna Charta, there had been an uniform system pursued of summoning to Parliament the class of tenants who held *per Baroniam.* But that this was not the practice of succeeding Sovereigns appears from a passage in the learned and able Report on the Dignity of a Peer, to which we have all of us been so largely indebted in this inquiry. In page 289, first report, it is said, "In summoning the Temporal Lords to their Parliaments, both Edward I. and his son, in many instances, seemed to have used discretionary power; persons summoned at one time being frequently omitted in the writs * of summons at * 132 other times;" and proof of this is given in documents stated in the third report.

The discretion thus exercised has an important bearing upon the present claim. For if the right to be summoned depended upon tenure, those who were omitted might have defeated the attempt to exclude them by presenting themselves at the time and place appointed, and claiming their right to a seat in the Council.

Hitherto we have found no evidence to prove the existence of the right claimed before the end of the reign of Henry III., when Parliament first began to assume its present shape. Its constitution had been definitively settled before the 15 Edw. 2, when a statute was passed declaring what was the legislative authority of the kingdom. The language of that statute is, "That matters to be established for the estate of the King and of his heirs, and for the estate of the realm and of the people ought to be treated, accorded and established in Parliament by the King and by the assent of the Prelates, Earls, and Barons, and the Commonalty of the realm *according as had been before accustomed.*"

Here one may pause, and fairly ask whether down to this period of our historical records there is any trace of persons holding of the Crown *per Baroniam* being entitled to insist upon a summons to Parliament by reason of tenure; whether it can be truly alleged

that it "had been so accustomed" before the Statute of Edw. II. On this subject a passage in the first report of the Committee was referred to by the Attorney-General in the course of his argument, which is of considerable importance; it is in these terms (p. 292): "The manner in which such matters had, immediately before that statute, been accustomed to be treated, accorded, and * 133 established in and from the 23 * Edw. 1, a period of thirty years, and perhaps occasionally in an earlier part of the reign of Edward I., was by laws made by the King with the assent of those Lords spiritual and temporal, to whom the King's special writs of summons had been addressed for the purpose; and with the assent of the knights elected for the several shires of the kingdom, and citizens and burgesses chosen for certain cities and boroughs of the kingdom, in pursuance of writs issued by the King for that purpose; the precedent in the 23 Edw. 3, being after that year apparently the general guide in the issue and execution of those writs. The statute treats this mode of constituting the legislative power of the realm as depending on custom, and not on positive enactment by statute, and seems therefore of itself strong evidence to show that no such enacting statute was supposed in the 15 Edw. 2, to have been ever made."

But, in this dearth of evidence, the claimant thinks himself warranted in maintaining that a right of attending Parliament was a privilege belonging to all baronies by tenure, and to Berkeley as one of them; that although nearly all the rest of those baronies have disappeared from the scene, Berkeley has continued to exist, unaffected by all the changes in the constitution of the Legislature, as at the beginning, a pure barony by tenure, subject, indeed, to all the incidents of property, but with the prerogative quality of ennobling all who are fortunate enough to become the owners of a sufficient estate in it, whether by descent or purchase.

Such a claim at the present day is so entirely at variance with every notion of the hereditary character of our nobility, and with the established maxim that the Sovereign is the fountain of honours, that it can hardly be considered unfair to press the claimant with all the difficulties which must surround a claim of this descrip- * 134 tion. If the * dignity is inseparably incident to the tenure, it seems impossible to deny that it must follow every devolution of the property. It may not, perhaps, pass to a tenant for years, because he is not in of the tenure; but why should not a

tenant for life, whether for his own life or for that of another, by whatever mode he acquires the property, become entitled to the dignity?

In order to obviate some of the difficulties of his position, the counsel for the claimant contended that a mere legal estate in the land would not be sufficient; but that to carry the dignity the legal and beneficial interest for an estate of freehold at the least must be united in the same person. And he endeavoured to escape from the hypothetical cases of transfers of the property with which he was pressed during the argument, by saying, that the word "heirs" must be taken as embracing successors, and that in that sense a person taking under an assignment in bankruptcy, or by disseisin, or by a title paramount to that of the *heirs* of Robert Fitzhardinge, or not under a voluntary act of the former possessor, would not be a successor. But this appears to me to be an abandonment of the whole ground on which the claimant rests. It is the possession of the castle and lands for an estate of freehold which is said to confer the dignity. The claim is based entirely upon the tenure of these lands; and to say that a person who acquires a rightful title to the lands by a regular conveyance, or by a wrongful disseisin which time afterwards ripens into a rightful possession, is not a successor of Robert Fitzhardinge, is to make the dignity personal to Robert and his descendants, instead of being annexed to the lands to which every person who comes in by devolution of the property is a successor.

There is one step, however, which is entirely wanting in the claimant's proof, and which occasions a deficiency that * is almost fatal to the claim. There is not a particle of * 135 proof that lands held *per Baroniam* were ever transferred to a stranger by the mere act of the tenant, so as to pass the dignity with them. And when it is remembered, that after the 1 Edw. 3, s. 2, c. 12, absolute forfeiture for alienation of lands holden in chief of the Crown without license could no longer be enforced, and that only a reasonable fine (afterwards settled at a year's value of the lands) could be demanded, it does seem strange that, when the dignity of the peerage could be acquired at so cheap a rate, no one instance should be found of the dignity being obtained by such an alienation.

Instances indeed have been adduced of alienations to the family of a person originally holding *per Baroniam;* but these, as far as

I have traced them, have always been with the license of the Crown, and they, therefore, still left the Sovereign the fountain from which the honour flowed to the alienee. And whatever may have been in very early times the indissoluble union of the land and the dignity, it seems that alienations afterwards took place without transferring the dignity, which remained with the original possessor and his descendants. This is stated in a passage from Selden, printed by the claimant himself, in his Supplemental Case, p. 93, in these words: "The like is to be said of the baronies also that were of the honorary possessions of the antient barons, and have been aliened by them. For though these often have retained the name of baronies in other hands, yet they were so stiled but in regard of their being in truth honorary baronies formerly; and their barons became, upon such alienation, also barons, by writ only (retaining their antient place and dignity), because their possessions were gone, which, at first, made their ancestors barons by tenure." If this statement is correct, it breaks in most seriously upon * 136 the claimant's * case; for it shows, that so far from his argument of the inseparable connexion of the dignity and the lands in a barony by tenure being true, the dignity might remain to the tenant, though he had parted with the only foundation on which it is said to have been possible for it to have rested.

The doubt which has thus been shown to hang over the original character of baronies by tenure, the absence of all proof of the dignity ever having passed to a stranger by the mere alienation of the lands, the necessity, as far as appears, of a license from the Crown before the possessor of the dignity could pass the ennobling lands to one of the family, and the instances alleged of the retention of the dignity, with all its rank and privileges, after the alienation of the lands to which it was annexed, might well justify the language of the Judges and the other learned persons who were consulted in the *Fitzwalter Case*, when they said, "that whatever pretence there might be for presuming that there were originally baronies by tenure, yet that baronies by tenure had been discontinued for many years, and were then not in being, and so not fit to be revived or to admit any pretence or right of succession thereupon; and that the pretence of barony by tenure was therefore not to be insisted on."

But the claimant says that these learned persons were in error in saying that baronies by tenure were not in being; for that

although they had very generally disappeared, yet that there were three of such baronies in existence at the time of the passing of the 12 Car. 2, viz., Arundel, Abergavenny, and his own Barony of Berkeley. It is not my intention to occupy the time of the Committee by going in detail into these three surviving instances of baronies by tenure. But as the claimant insists that the proviso in the Statute of Charles II. (which will * presently * 137 be considered) was specially directed to the case of these three baronies, it is necessary very shortly to examine their position at the passing of that statute.

With respect to Arundel it is unnecessary to go into the antecedent history of the title prior to the Act of 3 Car. 1, c. 4. The proceedings in the reign of Henry VI. do not appear to have been very narrowly watched or at all opposed, but it is not improbable that from time whereof memory did not run, the name and title had been united and annexed to the Castle, Honor, and Lordship of Arundel by the owners in succession having invariably borne the title. Without, however, considering whether the prescriptive title thus claimed was a barony by tenure or not, it is surely unnecessary to go back to the previous state of things when the whole question was set at rest by the Statute of Charles I. After this statute, Arundel ceased to be a prescriptive earldom or barony by tenure, the rights of all future owners of the property being regulated by the Act of Parliament. The object of the Act was to prevent the dignity being impoverished, and for this purpose to annex its possessions for its support and maintenance, which were to be inalienable. This is shown by the recital, "Whereas the large revenues that were in former tymes wont to support the said title, name, and dignitie have, in the latter ages, beene dismembred and diminished by divers and sundrie alienations, and in future times may be much more lessened, yf due prevencon bee not thereof had, which can no waie so well be had as by annexing as well of the said Castle, Honor, and Lordshipp as alsoe divers others of the baronies, lordshippes, manors, lands, tenements, and hereditaments of the said Earle herein menconed, to be annexed to the said title, name, and dignitie of Earl of Arundell, in such sort as that hereafter the said Castle, Honor, and Lordshipp, and other * the baronies, mannors, landes, tenements, and heredita- * 138 ments so menconed to be annexed, may contynuallie remaine to those of the bloud of the said Earle that shall hereafter as afore-

said have, use, and enjoy the title, name, and dignitie of Earle of Arundell, that soe they may the better support the said titles, names, and dignities, and be the more able to serve your most excellent Majestie, your heires, and successors in their rancke and qualitie." So that the title of Arundel does not depend upon tenure, but the castle and lands are brought into indissoluble union with the title by legislative enactment.

With respect to the title of Abergavenny, another supposed barony by tenure, it cannot possibly affect the propriety of the opinion on the *Fitzwalter Case*, because, whatever it may have been originally, by the proceedings in the reign of James I., all idea of founding a claim to the dignity on the ground of tenure must have been for ever abandoned. No such claim was likely to be put forward by the descendant of the heirs male who had claimed the barony as a barony by tenure, because he was, upon the compromise which was made, restored to the rank and place which the Lords of Abergavenny had originally enjoyed. The question could, therefore, only be raised afterwards by an alienee of the lands, and with what prospect of success the proceedings themselves and the want of authority to support such a transfer of the dignity may enable us to conjecture without much difficulty.

It only remains to consider what was the position of Berkeley at the time when the opinion that baronies by tenure were not then in being was delivered. It must be conceded that Berkeley was a possession held originally *per Baroniam*, as the amount of the relief paid for it clearly shows, and that the Lords of Berkeley sat in Parliament during many of the early reigns. The barony
* 139 * afterwards fell into abeyance, but in the 9 Hen. 5, a new writ was issued to James de Berkeley, who was then in possession of the castle. There are no means of ascertaining whether that writ was issued as of right, by reason of the tenure of the lands, or whether it was of grace and favour to the heir male of an ancient family. But in the reign of Henry VII., the Marquess of Berkeley, in pursuance of an agreement with the King, entailed the Castle and Barony of Berkeley, after a limitation to himself and the heirs of his body, to the King and the heirs male of his body, with remainder to his own right heirs. Under this limitation, the barony was in the Crown for a period of more than sixty years, until the death of Edward VI. During the greater part of this time no one sat in Parliament as Baron of Berkeley; and it is not

unfairly argued that this arose from its being a barony by tenure, and that the title was suspended while the castle was in the King's hands. But during this period, Maurice Berkeley, who would have been entitled to the castle, and with it (as it is asserted) to the barony, consented, after some hesitation, to accept a new writ of summons from King Henry VIII., as Baron of Berkeley. Under this writ, the descendants of Maurice were allowed the ancient precedence which was enjoyed by the Lords of Berkeley from the first writ which issued to them in the 23 Edw. 1. When the family was restored to the possession of the castle, there was no occasion to challenge the right to the dignity by reason of the tenure of the lands, and there is consequently an absence of evidence that this right continued to subsist after the acceptance of the barony by the writ of Henry VIII.

It was necessary to consider the position of these supposed baronies by tenure, because the claimant asserts that the proviso in the 11th section of the 12 Car. 2, was inserted with a special regard to these titles. From the * review which I * 140 have taken of them, it seems highly improbable that they should have been in the contemplation of the Legislature at all, or if they were, that any rights to the extent insisted upon could ever be meant to be preserved and perpetuated. And it appears to me that the proper view of the effect of the saving clause is totally different from that for which the claimant contends. For the purpose of determining its correct construction it may be assumed that some baronies by tenure were still in existence. In the course of the argument the claimant alleged, that the privilege of being summoned to Parliament was so intimately blended with the tenure, that if it were severed from it, the tenure would no longer remain. By the same reason if the tenure were abolished, the privilege must cease with it. Now, the principal object of the Act was to put an end to all tenures by knight-service, amongst which were included tenures *per Baroniam*, which the claimant alleges to have been tenure by knight-service, with the privilege of being a member of the Great Council of the nation. The Legislature must have been aware, that with the abolition of the tenure all its incidents must fall; and therefore to prevent any prejudice to persons having titles dependent upon the tenure (if any such there were) it inserted a clause which would give them all the protection they required, without extending the benefit beyond the neces-

sity. It was, therefore, provided that "neither the Act nor any thing therein contained, should infringe or hurt any title of Honor, feudal or other, by which any person hath or may have right to sit in the Lords' House of Parliament, as to his or their title of Honor or sitting in Parliament, and the privilege belonging to them as Peers." What is preserved by this clause, is "the title of Honor, by which any person hath or may have right to sit in Parlia-
* 141 ment." The effect of the clause, * therefore, is to prevent the title which depended upon the tenure from being lost to the possessor, by taking away the foundation on which it rested. It virtually transforms a barony by tenure into a barony by writ. The only difficulty which can possibly be suggested, arises upon the reference to the person who "may have right to sit in Parliament" by the feudal title. I should be disposed to construe these words as extending to preserve not only the right of the then possessor of the title, but the rights of all his descendants, who would have succeeded to the title if the feudal possessions had been suffered to descend to them. It is unreasonable to put the large construction upon the words which alone can serve the purpose of the claimant, and to suppose an intention on the part of the Legislature to preserve the right to any possible alienee who might thereafter become possessed of the lands. As such an alienee could previously only have acquired the title by transfer of the tenure to him, it would be quite inconsistent for the Legislature to have abolished the tenure, and yet to have continued the dependent title in favour of a future contingent owner of the lands.

Even then, if it had been clearly established, not only that Berkeley was a barony by tenure, but that it had uninterruptedly preserved all its qualities and privileged incidents, down to the 12 Car. 2, still, as that Act took away all territorial baronies, and made the titles dependent upon them to be merely personal, the present claim was thus deprived of all foundation on which it could previously have stood; and the Act itself, in my opinion, furnishes a complete answer to the whole case of the claimant.

Lord Wensleydale. — My Lords, in this case, I was present during a part of the argument of the most learned and able
* 142 counsel in favour * of the petitioner, but during a part only, and I heard no part of the answer on the part of the Crown; and, therefore, in a case of so much importance, requiring

so much accurate and close investigation, I do not feel that I am in a position to offer any advice to the Committee upon the subject; but I may say this, that having considered the case during the progress of the argument, the part which I heard, and having now heard the learned opinions of my noble and learned friends who have addressed the Committee, it would be wrong in me to say that I entertain any doubt upon the question, so far as I have formed any opinion.

THE CHAIRMAN (LORD REDESDALE). — My Lords, as I concur in the decision come to by the noble and learned Lords who have spoken, that the claimant is not entitled to a writ of summons, as Baron Berkeley, by tenure of the castle and honor, I should not have troubled your Lordships with any observations on the subject, if I agreed with all the reasons given for such decision, or if those reasons appeared to me to refute the arguments and evidence brought before us in support of the claim, on all points.

The right to a peerage is not to be set aside, because the granting it on the grounds on which it is claimed would afford an inconvenient precedent. The law by which that right is to be tried is that of usage and record only; and when the claimant gives evidence of these in his favour, I do not think that his request is unreasonable, that when we refuse to admit his claim, we should say when and under what circumstances the usage which he has shown to have once existed, ceased.

It has been laid down by the Attorney-General, and assented to by some noble and learned Lords who have * pre- * 143
ceded me, that the Barony of Berkeley, to which Maurice Berkeley was summoned to Parliament by the writ of 23 Edw. 1, is subject to the ordinary conditions of a barony by writ, and that on the death of Thomas, Lord Berkeley, in the fifth of Henry V., it went to his daughter and sole heiress, and is now in abeyance between the heirs of her daughters and co-heiresses. It appears to me, however, most indisputably, from the evidence before me, that the countess did not inherit the barony; but that it went to Thomas's nephew, and heir male, Sir James Berkeley, who also inherited the Castle of Berkeley under a settlement made with license from the Crown by his great grandfather.

The claimant alleges that the barony is his, because the castle

was his. He has, I think, proved that Berkeley was an ancient territorial barony; that the territorial baronies of Greystock and Abergavenny passed by legal transfer with the license from the Crown, required at the time for alienation to other persons than the heirs of the original grantee; and that the inheritance of the Barony of Deincourt was transferred by settlement, with like consent, from an existing heir general apparent to heirs male. And I farther think, that he has shown that the Barony of Berkeley, in like manner, in the reign of Henry V., passed under an entail made in that of Edward III. to heirs male, to the exclusion of the heir general. In proof that it should be still held to exist as a barony by tenure, he relies mainly on the cases of the *Earldom of Arundel*, and the *Barony of Abergavenny*, on both of which we have laboured treatises in supplement to his own case. These cases having been decided by this House, they must be held of great importance in determining the law of usage.

It appears to me, that there is nothing in the decision of * 144 the House in the *Arundel Case* which tends to establish * the present claim. There has always been this marked distinction between earldoms and territorial baronies. The grant of an earldom conferred a seat in Parliament. And precedence, from the date of the instrument, conferring the earldom without any regard to writ of summons, or sitting, has always been allowed by this House. As regards baronies, although the writ may have been unquestionably issued on account of the land barony possessed by the person to whom it was directed, precedence from the date of the writ has alone been admitted by this House, and not from that of the grant of the barony. The writ has always been considered by this House as necessary to the existence of the Parliamentary barony, and the source and evidence of its existence. This fact is of the utmost importance in relation to the *Arundel Case*. The question which the House had to decide was how that earldom originated. It is clear that no instrument, creating it, ever existed. The claim of John Fitzalan was: "That his ancestors, Earls of Arundel, Lords of the Castle, Honor, and Lordship of Arundel, have had their place to sit in the Parliaments and Councils of the noble progenitors of our Lord the King, from time whereof memory runneth not, by reason of the Castle, Honor, and Lordship aforesaid." Now, if this statement meant that all his ancestors who

had held the castle, &c., had been Earls of Arundel, it was not true. The first two possessors of them of his own name were not Earls of Arundel, as is most clearly shown in the evidence before us; and the House, after stating his claim, carefully abstained from admitting that all his ancestors who had held the castle had been Earls of Arundel. They found only that "Richard, cousin and one of the heirs of Hugh de Albini, some time Earl of Arundel, was seised of the said castle, &c., and by reason of the possession thereof, without any other reason or creation * was * 145 Earl of Arundel, and peacefully possessed the same without any challenge, claim, or hindrance." A writ of summons cannot create an earldom. There was no patent, or other instrument creating that of Arundel; and, in the absence of any other reason or creation, for Richard to have the place and seat as Earl of Arundel in the Parliaments and Councils of the King without challenge, the House resolved that he was entitled to it by the tenure of the castle. This could not have occurred with a barony, as the writ under which the person or his ancestors had been summoned would, in default of any other instrument of creation, have been held to be the reason for and creation of the barony. The Earldom of Arundel is a case by itself, and affords no precedent for any other. That many baronies by tenure have existed is admitted, and that they were recognised by the general law. No other earldom by tenure has ever been recognised; and the claim of John Fitzalan to it was therefore a claim by particular prescription, differing from, and not affording any precedent for, a claim founded on general law. I would only farther observe, as regards this earldom, that the objections to the existence of such an honour by tenure, stated by the noble and learned Lords who have addressed the House, were then felt to be so strong, that its existence by tenure was put an end to by Act of Parliament; and at the present time, consequently, there is no earldom by tenure existing.

I now proceed to consider the case of baronies by tenure. The earliest records of Parliamentary summons show that persons who did not possess such baronies were summoned together, and had equal voice in Parliament with the *Majores Barones;* though the evidence we have received shows that there was for some time a distinction between them in other respects. This distinction by degrees passed away, and the right of summons in respect

* 146 of tenure ceased * also; and I propose now to show, from the evidence before us, when, as it appears to me, that the latter ceased.

So long as these baronies could not be alienated without license from the Crown, the objections to them, so ably stated by the noble and learned Lords, did not exist. There would, therefore, be every reason to expect that, when a fine was made the legal penalty for their alienation without license, instead of forfeiture, a change would take place also in the privileges of Parliament, and of nobility attached to them. This alteration of the law with respect to forfeiture on alienation took place in the reign of Edward III. From the commencement of the reign of his successor a great change in regard to the baronage unquestionably took place, as is noticed in the Peerage Reports, and by the Attorney-General in his argument on this occasion. As regards the particular point I am now discussing, this change is admitted by the learned counsel for the claimant, whose information on such subjects is justly acknowledged to be very great. In page 19, Supplemental case, note P, it is remarked, that "The distinction between the Lords of Parliament who held by barony and the Lords of Parliament who were not Barons by tenure, was certainly maintained until the close of the fourteenth century, and probably only ceased when the dignity of Baron with a seat in Parliament was granted by letters patent, from which time such distinction could not be maintained." Baronies by patent were first granted by Richard II.; and it appears to me that the evidence before us shows, first, that no settlement or conveyance of any territorial barony made after the commencement of that reign has ever been recognized by this House as determining the descent of such barony as a Parliamentary barony and title of nobility; and, secondly, that settlements made before that date, with license * 147 from the Crown, did determine such descent, * and that the House has recognized their validity for this purpose. If such shall prove to be the case, the question as to when baronies by tenure ceased to exist will be satisfactorily answered; and it will be clear that from the time of Richard II. baronies became a personal right vested in the heirs general of the person summoned, or in the heirs under any subsequent settlement made with license from the Crown before the commencement of that reign.

All will admit that the careful search made for evidence in support of this claim, during the long period it has been at different times before the House, has secured to us every document of importance by which it could be supported. No evidence could be more generally known, or more easily procured if it existed, than that of the admission by this House of any settlement made subsequent to the reign of Edward III. determining the succession to any barony; but none has been produced (except those relied on in the Abergavenny and Berkeley Peerages, which I propose to show have not been recognised by this House), although the production of such would have tended materially to support the claim.

It is clear that if such a transfer of a peerage by the conveyance of a land barony could have been made, when license from the Crown for such alienation was no longer necessary, it is a very improbable thing that nothing of the sort should have occurred during many centuries. The necessities of one man, the dislike of his heir by another, with the power of alienating, by a grant in reversion after his own death, whims, and preferences of various kinds, and the high price which would have been capable of being obtained for such a barony, must have led to some transaction of the kind having taken place, and, of necessity, to its having been recorded, had the thing been possible. I think, therefore, that if I show that neither William Beauchamp's *settle- *148 ment, nor the Marquess of Berkeley's, has been recognised by this House (which I will treat of in discussing the next point), the first point I have undertaken to establish, namely, that no settlement or conveyance of any territorial barony made after the commencement of the reign of Richard II. has ever been recognised by the House as determining the descent of such barony as a Parliamentary barony, is proved by default of any evidence existing of even one such transaction.

The second point I have raised, that a settlement of a territorial barony made before the reign of Richard II. has determined the descent of a Peerage, and has been admitted by the House to do so, appears clearly in the *Abergavenny Case*. In the precedence allowed to the barony in James I.'s time, it was determined by this House that the entail of this barony by Hastings, Earl of Pembroke, on William Beauchamp, in 26 Edw. 3, conveyed his own place and precedence in Parliament in right thereof, and that

the writ to William Beauchamp in the reign of Richard II. did not create a new barony.

Mr. Fleming greatly relied on what occurred in relation to the barony on the death of William Beauchamp, as proving that it was by tenure. William Beauchamp had, rightly or otherwise (for this appears to have been disputed), made a settlement of the castle, &c., on himself and his wife, and their heirs male, and, failing such, on his brother, the Earl of Warwick, and his heirs male. On his death, in 12 Hen. 4, 1411 (not 1410, as stated in the pedigree), his son was fourteen years old, and consequently came of age in 1418, 5 Hen. 5. He was not summoned to the Parliament which met in 7 Hen. 5, but was created Earl of Worcester next year. Mr. Fleming, relying on the mistaken date of his father's death, stated, that he was of age and might have
* 149 been summoned in 4 Hen. 5 also, which * apparently he could not. The omission of a summons to one Parliament cannot be relied upon as proving much; but Mr. Fleming urges that he was not entitled to receive one, because he was not seised of the castle. He died during his mother's lifetime, leaving an infant daughter, who, before her grandmother's death, was wife of Edward Neville, though at that time only sixteen years of age. The castle was taken possession of by the Earl of Warwick under protest from Edward Neville, and held for four years, and on his death it went to his son, who was made Duke of Warwick, and was the most powerful Peer of his day. Neville and his wife somehow got possession of the castle, and apparently during that possession their son was born. The Duke turned them out, and died in possession, leaving an only daughter. Neville and his wife again entered, and were again turned out "by colour of an inquisition," and the Duke's daughter Anne put in, on whose death the castle fell into the hands of the King, by whom it was granted to Neville, his wife having died a short time before. All this appears in the license from the Crown to Edward Neville in 27 Hen. 6. In 29 Hen. 6 he was summoned to Parliament as Lord Abergavenny.

On these events Mr. Fleming says, "he could not have been summoned in any but the territorial title. It could not be by reason of any personal dignity which might have been vested in his wife, because, though during the lifetime of a Peeress, the Crown might summon her husband into her barony, the moment she

died the power determined. Such was found to be the law in the *Dacre Case*, in the reign of James I." This appears to me to be an incorrect statement of that case. Lady Dacre's husband claimed to be summoned. This House came to no decision on his petition, though it was before the House several years. Lady Dacre died, and her son was immediately * summoned * 150 to Parliament, which of course put an end to the father's claim. But Mr. Fleming well knows that the right to summons *jure uxoris* had practically come to an end long before. There is, I believe, no instance of one being admitted since the time of Henry VII. The House of Lords in the reign of James I. probably considered that the time from the last case might scarcely be long enough to declare the claim barred by non-usage, and defeated it by delay. But in the time of Henry VI. there is no doubt that a peerage was considered in the light of a real estate, in which a tenancy by courtesy existed, and that, particularly where there was issue, the husband had a right to it for his life.

With regard to Neville's wife not having been acknowledged Lady Abergavenny while she had not possession of the castle, I would remark, that at that time of transition from one system to another, there may have been a question whether the land and the heirship must not be combined to perfect the right to the Parliamentary barony; and that there were doubts on the subject is very strongly confirmed by the well-known patent of the Barony of De L'Isle. This uncertain state of peerage law, and the strong influence of the Earl and Duke of Warwick, may have prevented her rights being acknowledged. One point is very certain: there is no record that any other person during that time was recognised to have the Parliamentary barony by writ from the Crown, or by admission to this House, as Lord Abergavenny; and the evidence on which Mr. Fleming relies, as proving that Neville was summoned in right of tenure, and not of any personal dignity in his wife, if carefully examined, tells the other way. He pleads that Neville was not summoned till 29 Hen. 6, and that he was then summoned because he had obtained possession of the castle from the Crown by the license before mentioned in 27 Hen. 6. Then, if possession * of the castle was the foundation of his * 151 right to summons, why was he not summoned to the Parliament which met in 28 Hen. 6, when he was seised of it?

But there is a point to which I would direct your Lordships'

attention, as clearly proving that he was acknowledged to have become a Peer in right of his wife's personal dignity some time before, for he is called Lord Abergavenny in the license which granted him the castle, his wife having survived the Duke of Warwick about two years. Why he was not summoned before the 29 Hen. 6, cannot now be determined. It only shows that at that time there was great irregularity in that respect; and it accounts also for William Beauchamp's son not having been summoned to the first Parliament which met after he was of age, one year only before he was created an Earl.

I will now direct your Lordships' attention to the manner in which these facts prove the position I have engaged to maintain, namely, that there is no record of the Crown or Parliament ever having acknowledged the effect of any settlement of a territorial barony, made after the commencement of the reign of Richard II., determining the right to the Parliamentary barony. From William Beauchamp, who was summoned as Lord Abergavenny, in right of the entail made by the Earl of Pembroke in 48 Edw. 3, there is no summons to any one as Lord Abergavenny before his granddaughter's and sole heiress's husband was summoned, in 29 Hen. 6, in right of the courtesy then existing.

I am therefore justified in asserting, that, so far as this House is concerned, there is no record that the Parliamentary barony was conveyed from the right heirs under the Earl of Pembroke's settlement by the entail made by William Beauchamp of the territorial barony; and that though Neville and his wife were kept for several years from the enjoyment of their just rights, yet, when they *152 were *acknowledged, there is evidence that it was first as a personal, and not as a territorial dignity. From that summons in 29 Hen. 6, no question arises as to the descent of the barony till the death of Henry Neville, Lord Abergavenny, in 1587, when the well-known contest arose for it. It is unnecessary to describe at length what then took place, as the details must be familiar to all your Lordships.

It is evident, from the proceedings in the *Abergavenny Case*, that the majority of the Peers felt anxious to give the barony to the heir male; and if they had been prepared to accept the interpretation of all that occurred between the death of William Beauchamp and the writ of summons to Edward Neville, which Mr. Fleming has given, and to agree that William Beauchamp's entail

determined the heirship to the barony, they had only to declare it to be a barony by tenure, and their object would have been secured in a far more intelligible manner than it was ultimately, and, be it remembered, with no objectionable consequences, except as to the precedent it would have afforded, as the castle and honour were under a strict Parliamentary entail on the heir male, which exists to the present day. But the House would not resolve that there was such a thing as a barony by tenure, even under such temptation; and the legal opinions were too strong in favour of the right being with the heir general to justify a decision for the heir male, unless by tenure. They refused to recognise the will of George, Lord Abergavenny, or the Act of Parliament which superseded it, as governing the descent of the barony, which would have given it to Neville as of right; and finding that one of the claimants was a co-heir of the Barony of Le Despenser, which had been long in abeyance, they resolved to put the Barony of Abergavenny into a (till then unknown) sort of abeyance, by informing the Crown that they could not determine * which * 153 of the claimants was entitled to it; the intention of the House being, that this barony should be thus placed also at the disposal of the Crown, who should restore one to each claimant; all parties concerned apparently concurring in this illegal job. James, who loved a joke, showed his opinion of the arrangement by declining to determine the abeyances himself, and by allowing the Peers to give, if they chose, the Barony of Le Despenser to Neville and his heirs male, who had no claim to that barony at all, implying thereby that he had just as much right to it as he had to the Barony of Abergavenny. An arrangement, therefore, was come to which was not creditable to the House, and which certainly could never be proposed at the present day. The manner in which both peerages were awarded by restitution is a proof that the House was resolved not to declare Abergavenny to be Neville's by tenure, and the precedence allowed to Le Despenser over it, proves that its existence, as a Parliamentary barony, was only allowed to date from the writ to the first of the Lords Hastings, who became possessed of the territorial barony of Abergavenny, and who was the first possessor of it who had received a writ of summons to Parliament.

The other case in which the House has allowed a settlement, made before Richard II., to determine the inheritance to the

barony, is the Barony of Berkeley. As I have before mentioned, Thomas Lord Berkeley, who died in 35 Edw. 3, entailed in 23 Edw. 3, with license from the Crown, the castle, &c., to his heirs male; and on the death of his grandson Thomas, without male issue, in 1417, 5 Hen. 5, the barony went to the heir male. I consider this settlement to have been recognised by the House on account of the precedence allowed to the Lords Berkeley, which clearly has always been earlier than the summons to the heir male in 9 Hen. 5. The claimant urges that the settlement
* 154 * made by the Marquess of Berkeley, in the reign of Henry VII., was also effective in transferring the barony, with the castle, to the Crown, to the exclusion of the heir of line.

The first proceedings under that settlement favour, to some extent, such a conclusion, as Maurice, the next brother of the Marquess, was never summoned to Parliament. His son, Maurice, was summoned, and we have evidence of his having scrupled to take the honour, as it was intimated that he was to sit as junior baron. This is all that occurred which supports the idea of the barony being attached to the castle, and that the settlement of the Marquess determined the right to it. We find that Maurice considered himself entitled to the old barony, though he had not the castle, and that his advisers, eminent lawyers, concurred with him in that opinion, and informed him that "divers Lords would have him labour for that precedence." His legal friends, however, recommended a contrary course, "as peradventure he should have a more convenient time hereafter than now." When we consider that Henry VIII. was not a very safe King to offend, and that the Peers were then beginning to move in the matter of their privileges, and later in the reign obtained the Act for placing the Peers, which secured to all their rightful precedence, the prudence of the advice, and the important bearing it has on the case, will be understood.

Maurice died without issue; a few years after his death, his brother Thomas appears to me unquestionably to have had his claim to the ancient peerage allowed, although the castle was still in the Crown. Mr. Fleming admits that he was Lord Berkeley two or three years before the writ of summons was issued to him, and endeavours to account for it by saying that he may have been invested as Baron by a new creation at the earlier time. As, however, there is no evidence of investiture in this case, his ad-

mission to * the old barony is the far more probable inter- *155
pretation to put on the occurrence; and this is confirmed
by what took place afterwards. The Journals do not afford any evidence of the attendance and placing of Peers during his life, but his son was summoned on his death, and certainly had the place of the old barony. This is disputed by Mr. Fleming, although he is constrained to admit that he had high precedence, which he contends must have been by favour of the Crown, for no other reason than that he finds that the placing of some other Barons was not in strict accordance with the rights of their respective peerages. In early times, however, the placing of the old Barons was, in this respect, very irregular, and it may be questioned whether all, even now, enjoy their just precedence. But when we find Thomas Lord Berkeley placed fourth Baron next below Lord Zouche, and retaining that place during the whole of the only Parliament he lived to attend, and that his son, when he came of age, and took his seat, in 4th and 5th Philip and Mary, having inherited the castle on the death of Edward VI., was placed also below Lord Zouche the first day, and, though moved above him for about a month, was placed below him again, and that he and his successors remained in that placing from that time, it is impossible to come to any other conclusion than that the place assigned to his father, in 25 Hen. 8, was that of the old barony, although he did not possess the castle.

It appears, therefore, certain that the settlement of the castle by the Marquess, in the reign of Henry VII., was ultimately held, both by the Crown and by this House, not to affect the settlement of the barony made by Thomas with license from Edward III., and under which I am induced by the evidence to think that the barony is still held, as being the last instrument which has determined the succession to it.

* In the opinion given by the Judges in the *Fitzwalter* *156
Case I fully concur. The Peers, however, acted rightly in
not allowing the decision of the Privy Council on that opinion to bind them, but when they determined the precedence they confirmed it. This case is conclusive on the point I contend for, that no Parliamentary barony has ever been acknowledged by this House to have existed prior to its first writ of summons, whether that writ was issued to the holder of a land barony or not. Robert Fitzwalter, who was first summoned 23 Edw. 1, was grandson and

heir of Robert Fitzwalter, the marshal of the army of Barons who obtained Magna Charta from King John. Of the earlier existence of his land barony there was, therefore, the clearest proof and most noted public evidence. That the writ was issued to his grandson, as possessing that barony, there can be no doubt. The claimant of the barony, in the reign of Charles II., was heir general of the first Robert, as well as of the grandson, but the precedence allowed was only that of the grandson. It is contended, that this was because the land barony had passed away from the heir general. Be it so; but then how did he get the precedence of the grandson who was summoned in the right of it? The first summons to Berkeley is like that to Fitzwalter in 23 Edw. 1. Both those summonses were directed to the holders of land baronies as such. The heir of Fitzwalter is admitted by this House to be entitled to the barony in which Fitzwalter was summoned, although the land barony was not his. How, then, can we decide that the heir of Berkeley is not entitled to the barony in which Berkeley was summoned, although the land barony is not his? The *Fitzwalter Case*, unless it can be impugned as an unjust decision, must govern the other.

The precedence in the *Abergavenny Case* affords farther * 157 * support to the fact of no earlier date having been allowed by this House to a barony commencing in tenure than the first writ of summons.

I will not trouble your Lordships by entering farther into detail, but will only add, that having given the strictest attention to the evidence and the arguments of the counsel on both sides in this case, I find, that in the *Abergavenny Case*, brought specially to our notice in support of the present claim, the barony, created by the writ of Edward I., passed under the entail of the territorial barony made by the Earl of Pembroke, with license from Edward III., to William Beauchamp and his heirs. That this entail was confirmed by Richard II., by summoning William Beauchamp to Parliament as Lord Abergavenny. That William Beauchamp made a new entail of the territorial barony on himself and his wife, and their heirs male, and, in default of such, to his brother, the Earl of Warwick, and his heirs male. That no person was ever summoned to Parliament claiming under that settlement as Lord Abergavenny. That the first summons of a Lord Abergavenny to Parliament after William Beauchamp, who inherited under the Earl of Pembroke's

entail, was Edward Neville, who claimed by courtesy (as then allowed) the barony to which his wife was heir under that entail. That, consequently, the settlement of William Beauchamp was never confirmed by any writ of summons from the King in accordance with it, or admitted as affecting the inheritance of the Parliamentary barony by this House. That in 1603 this House refused to admit George Lord Abergavenny's will, settling the territorial barony, or even the Act of Parliament, which also, with the consent of this House and the Crown, settled it, as determining the descent of the Parliamentary barony, by refusing * to * 158 give the barony to Edward Neville in right of such will or Act of Parliament. That, as regards the Barony of Berkeley, the entail of the territorial barony or heirs male by Thomas, Lord Berkeley, with license from Edward III., was confirmed by writ of summons to James, Lord Berkeley, 9 Hen. 5. That the entail of the territorial barony, made by the Marquess Berkeley, in Henry VII., though it had the effect of keeping the true heirs out of their rights for some years, was ultimately held not to affect the succession, as proved by Thomas, Lord Berkeley, having become Lord Berkeley two or three years before he was summoned, and by the House, in the place which we know was allowed to his son, neither of them being in possession of the territorial barony.

With these facts before us, I must come to the conclusion, that the entail in the will of Frederick Augustus, Earl of Berkeley, cannot be held to have transferred the Parliamentary with the territorial barony to the claimant.

I have tried this claim by the law of usage and record only, and find that they both deny the existence of baronies by tenure at the present time, and prove that (even with the license of the Crown) no transfer of a Parliamentary barony can be now made by any settlement of the territorial barony, from the heirs entitled to succeed to it at the commencement of the reign of Richard II.

It was proposed to resolve, —

That it is the opinion of this Committee, That the Right Honourable Sir Maurice Frederick Fitzhardinge Berkeley, K. C. B., hath not made out his claim to the title, honour, and dignity of Baron Berkeley, of Berkeley Castle, in the county of Gloucester.

* On the question being put, — * 159

It was resolved in the affirmative.

The Chairman was ordered to report the said resolution to the House.

The resolution of the Committee was reported to and adopted by the House on the 28th February.[1]

Lords' Journals, 28th February, 1861.

1861. March 8, 11.

BERTRAM HINDMARSH, *Appellant.*
MARGARET CHARLTON, *Respondent.*

Will. Attestation. Costs.

To make a valid subscription and attestation to a will there must be either the name of the witness or some mark intended to represent it. A correction of an error in a previous writing of his name, or his acknowledgment of it, or the adding of a date to it, will not be sufficient for that purpose.

The signature, or acknowledgment, of the testator must be made in the presence of two witnesses, present at the time; and they must, after he has so signed, or so acknowledged his signature, subscribe the will in his presence.

A testator produced his will to A., and signed it in A.'s presence. A., whose name consisted of four words, the first of which began with "F," then, in the

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[1] On the 8th February, 1861, the claimant presented a petition to the House stating that he conceived misapprehensions existed as to some of the precedents, and that it was essential that he should have the opportunity of removing the same; that farther precedents had been discovered which he was desirous to lay before the Committee, and he therefore prayed to be allowed to lay an additional case on the table of the House. These additional precedents were alleged to prove that the Crown could validly grant to a person the power of nominating his successor to a peerage; that dignities were appurtenant to landed estates and might pass, by conveyances and settlements, to strangers as well as to members of the settlor's family, and were not extinguished by such conveyances. In a paper printed at the same time it was stated that in the following cases, *Botetourt*, in 1764; *Airlie*, in 1812; *Lovat*, in 1831; *Hastings*, in 1841 (8 Cl. & F. 155); and *Herries*, in 1854, this additional evidence had been received after the arguments on both sides had been concluded.

The House ordered the petition to lie on the table.

testator's presence, signed his own name, but by accident left his first initial letter uncrossed, so that it stood as if it was "T." He afterwards advised the testator that there ought to be two witnesses to the will, and in the afternoon of the same day, B. being present, the testator produced his will, and showed and acknowledged his signature in the presence of both A. and B. B. then wrote his name, and at his desire A. added the date, and then observed and corrected the first initial of his own name by crossing the T, and so making it F:

Held, affirming the judgment of the Probate Court, that the will was not duly attested within the 1 Vict. c. 26, § 9.

No misconduct was imputed: no costs were given.

THE respondent had instituted a suit in the Probate Court against the present appellant, for the purpose of obtaining letters of administration of the personal estate of Joseph Hindmarsh, deceased, who died on the 26th December, 1857, leaving her, his sister (married to Thomas Charlton), his next of kin. She alleged that her brother died intestate. The appellant pleaded that the brother did not die intestate, but on the 17th December, 1857, made and duly executed a will, under which the appellant claimed as residuary legatee. The parties being thus at *issue, the * 161 Court of Probate made an order for trial, and the issue came on for trial at the Durham Spring Assizes in 1859, before Mr. Justice Byles; when, under the direction of the learned Judge, the jury returned a verdict for the defendant, declaring the will to have been duly executed, but leave was reserved to the Court of Probate to enter the verdict for the plaintiff in the suit, that Court being at liberty to draw inferences of fact, if it should think fit to do so. A motion for that purpose was accordingly made before the Judge Ordinary. The notes of the evidence taken at the trial were furnished by Mr. Justice Byles, and were to the following effect: Dr. Blair White, a physician at Newcastle, said, "I attended Joseph Hindmarsh. On the 17th December, 1857, I went into Hindmarsh's bed-room; two papers were produced by the housekeeper in the presence of Hindmarsh. Mr. Wilson, the other medical attendant, was present. I gave the papers into Hindmarsh's hands, and asked, if that was his signature? Hindmarsh put on his spectacles, examined the paper and the signature, and said, 'Most decidedly, this is my handwriting, and this is my will.' This was in the presence of Mr. Wilson and myself. I took the will from Hindmarsh's hand and signed it in that room. I remember Mr. Wilson

signing the date, because I requested him to do so." Mr. Frederick William Napoleon Wilson, surgeon, said, "On the forenoon of the 17th December, 1857, I saw Mr. Hindmarsh. I was asked by him to sign his will as a witness, and the will was brought out, both parts. He looked at it, and said that was his will. I wrote at the bottom, 'Witness to the above will and testament and signature,' and then my name, 'Fred. Wm. Nap. Wilson,' on both papers.

In the afternoon, Dr. White came. In the room Dr. White
* 162 examined * the patient as to his health. The doctor and I then went into the other room, where we had a consultation. I had suggested to Hindmarsh before we left the room, that he had better have another witness. Dr. White took the will in his hand, and we went back to the room where Hindmarsh was. Dr. White asked Hindmarsh, if that was his will? He said, 'Well, I can't see very well, get me my spectacles.' The housekeeper gave him his spectacles, and he sat up in the bed, and looked at the paper, and said, 'Yes, that is my will, and this is my signature.' At a small table, at the head of the bed, and close to the bed, Dr. White signed his name. After he had signed it, I took the papers and went across to the window, where there was another table, and sat down in an arm-chair; and then, after some conversation about the date being added, I distinctly remember retouching my name, by putting a cross on the *F* on the paper which is uppermost, and then I added the date in both wills, and then, I believe, the documents were both given to the housekeeper." On cross-examination, he said, "I very often omit to put a cross at all, and where I find it has not been done I always put it. I had noticed the omission of the cross. I had always been in the habit of supplying the omission. This was merely in pursuance of my habit. . . . I thought it was better to complete the name. I thought adding the date was equal to a repetition of the signature. I think I had no other intention. It was by the date I intended to repeat my signature. My sole object was to supply the omission, to make the name complete. I was attesting the will, and I thought it necessary to have a complete signature. My object was to make the signature of the morning complete."

The cause was heard before the Judge Ordinary, and
* 163 * on the 18th May, 1858, judgment was pronounced in favour of the plaintiff in the suit, on the ground that the facts

proved did not amount to a due attestation of the will according to the provisions of the 1 Vict. c. 26.[1] The verdict for the defendant was, therefore, ordered to be set aside, and a verdict entered for the plaintiff. This was an appeal against that decision.

Mr. Manisty and *Mr. Heath* for the appellant. — The will was duly executed. An attestation, which is the most important part of such a proceeding,[2] was complete. Both the witnesses were present when the testator acknowledged his signature. Both saw it and one of them had previously seen it made. The signature to the will need not be made by the testator in the presence of the two witnesses; it is sufficient if he acknowledges it in their presence, and if they attest his making or acknowledgment of it, *Ellis* v. *Smith*.[3] He did acknowledge it here, and then Dr. White fully signed it, and Mr. Wilson signed it too, for though he did not at that moment completely re-write his name, which he had written in the morning, finding he had not made a perfect signature, he made it perfect by adding a cross to the first letter. The attestation was, therefore, perfect. Before the Statute of Victoria a power to be exercised by a will "signed, sealed, * and published in the presence of and attested by three or more * 164 credible witnesses," was held to be satisfied as to its mode of execution by an attestation in this form, "Witness C. B., E. B., A. B.," *Burdett* v. *Spilsbury*.[4] In *Hudson* v. *Parker*,[5] the signature of the witnesses was held not to be sufficient only because they had not seen that of the testator, which was purposely concealed from them.

What was the object of the Legislature? It was to protect a testator by securing the means of knowing that a paper purporting to be a will, was really the will of the person making it. To attain that object, the recent statute requires that the witnesses "shall attest, and shall subscribe the will in the presence of the testator;"

[1] § 9. "That no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned (that is to say): it shall be signed at the foot or the end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

[2] 2 Bl. Com. 307.

[3] 1 Ves. Jun. 11.

[4] 10 Clark & F. 340.

[5] 1 Robertson, 14.

that was done here. It is not necessary that the witness should know that the paper is a will. If a man having any conscientious scruple about attesting wills, should duly put his name to a paper, which was in fact a will, it would be sufficient as an attestation, *White* v. *The Trustees of the British Museum.*[1] If, therefore, there was a physical subscription in the presence of the testator, the intention of the person who made it need not be considered. There was such a subscription here. A cross instead of a name is a sufficient signature, and under the Statute of Frauds that was held to be sufficient without showing that the person who made the cross was unable to write his name, *Baker* v. *Dening.*[2] Here was a name written and then a cross added, not perhaps as a substitute for a name, but for the purpose of perfecting the name and identifying the subscriber. [The LORD CHANCELLOR referred to *Case-*
* 165 *ment* v. *Fulton.*[3]] That case has been doubted, **Faulds* v. *Jackson.*[4] There a testator having written his will, produced it, with his signature attached, to T. C., who subscribed it, and then, by the testator's desire, T. C. called in W. R., from whom the testator desired to conceal the fact that it was his will; the testator said nothing, but placed his arm lengthwise over the paper, allowing the signature only to be seen. W. R. subscribed it. On appeal it was held that both the witnesses having seen the testator's signature there had been a sufficient execution. [The LORD CHANCELLOR. — Has it ever been decided what is the effect of tracing a name over again, without writing it?] Yes. In *Playne* v. *Scriven,*[5] it was held that tracing over again with a dry pen was not subscribing, but merely acknowledging the signature. But here something was written, something which, if no name had been written, would have been treated as a signature. And then, too, the date was added by Mr. Wilson, which showed his intention to be that what he then did should be his perfect subscription and attestation of the will.

The Solicitor-General (*Sir W. Atherton*), and *Dr. Spinks*, for the respondent. — The words of the statute must be exactly complied with, or the whole proceeding will be invalid. In the case of *James Byrd,*[6] where the witnesses first wrote their names and

[1] 6 Bing. 310.
[2] 8 A. & E. 94.
[3] 5 Moore P. C. 130.
[4] 6 Notes Eccl. Cas. Supp. p. i.
[5] 1 Robertson, 772.
[6] 3 Curteis, 117.

then the deceased wrote his, the application for probate was rejected. In *Moore* v. *King*,[1] the testator signed a codicil in the presence of his sister, who, at his desire, attested and subscribed it. On a subsequent day, when a third person was present, he desired his sister to bring him the codicil, and requested this other person to * attest and subscribe it, saying, in the * 166 presence of both, and pointing to the signature, "This is a codicil signed by myself and my sister, as you see; you will oblige me if you will add your signature, two witnesses being necessary." The other person did so in the presence of both, the sister pointing out her own signature and saying, "There is my signature, you had better place yours underneath." The sister, however, did not re-subscribe the will, and the attestation was held insufficient. The authority of that case cannot be doubted, and it governs the present.

The only real question here is, whether the addition by Mr. Wilson, of the cross and the date in the presence of Hindmarsh and of Dr. White, can be considered a subscription and attestation within the statute. It cannot be so treated. Crossing a *t* or dotting an *i*, though required to make a perfectly written signature, is not in itself a signing of the will. Nor does adding a date, or a word which is not part of a signature but of a description, bear that character. In *Trevanion's Case*[2] the word "Bristol" was added by one of the witnesses, but that was held insufficient. The name, or something *in loco nominis*, must be written. The case of *White* v. *The Trustees of the British Museum*, was one of the causes that led to the passing of the more recent and more strictly worded statute, and is of no authority in the present case.

Mr. Manisty replied.

THE LORD CHANCELLOR. — My Lords, these are very distressing cases for Judges to determine. I may honestly say that we have a strong inclination in our minds to support the validity of the will in dispute, which the parties *bonâ fide* made, as they believed, * according to law, and where there is not the * 167 smallest suspicion in the circumstances of the case. But we must obey the directions of the Legislature, and we are not

[1] Id. 243.

[2] 2 Robertson, 311.

at liberty to introduce nice distinctions which may bring about great uncertainty and confusion. Having heard the case very lucidly and ably argued on both sides, I am of opinion that the learned Judge of the Court below came to a right conclusion in holding that this will was not made in accordance with the requirements of the Legislature.

The Act of the 1 Vict. c. 26, § 9, requires that a will to be valid "shall be signed at the foot, or end thereof, by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator." It is settled by the case of *White* v. *The British Museum* [1] and other decisions to the same effect, that after the will has been signed or acknowledged by the testator in the presence of both the witnesses, there must be the subscription of the witnesses in the presence of the testator. The question in this case is, whether that which took place was a subscription of the witnesses, whose subscription is in question, or not? I will lay down this as my notion of the law: that to make a valid subscription of a witness, there must either be the name or some mark which is intended to represent the name. But on this occasion the name is not written, nor do I think that there was any thing written that was meant to represent the name. The horizontal stroke made by the witness was merely intended to perfect the letter "*F*" in the same manner as if he had perfected the letter "*i*" by *168 putting a dot over it, which * he had not dotted in the morning. Now, can that be considered as amounting to a subscription? It was an acknowledgment by him of his former signature written in the morning, but it is not a new subscription. It has been solemnly determined that an acknowledgment by a witness of his signature is not sufficient. When I was at the bar, there was a question whether the acknowledgment of the signature, by a witness putting a dry pen over it would be sufficient, but since that time it has been decided that it would not be sufficient; but this does not, in my opinion, amount to a subscription, because whether the "*i*" was dotted, or the horizontal stroke was put to the "*F*," to perfect the word, it was not intended that

[1] 6 Bing. 310.

either the dot or the horizontal stroke should represent the name; the name was written in the morning, and that would continue both till and after the evening, as the subscription of the witness.

I regret very much that we are compelled to hold this instrument to be an invalid will, but we are constrained so to do by the Act of Parliament; and therefore I must advise your Lordships that this appeal be dismissed.

LORD CRANWORTH.—I concur with my noble and learned friend in having a sort of personal feeling of regret that this will cannot be sustained as a valid will. It appears to be a reasonable will, and a will as to which there is not the least suspicion of any thing like fraud or imposition. But for the security of mankind, the Legislature has thought fit to prescribe certain forms and rules which are necessary to be complied with, in order to authorize a distribution of property, different from that which the law would make if there was no will; the Legislature, in truth, on these forms being complied with, putting into the hands of the party who is making a will, power to dispose of his property in a way * contrary to what, but for the will, would * 169 be the provision of the law. That it is reasonable that, under these circumstances, there should be some rules to be acted upon, no one can doubt; and those rules being established, this House, as the ultimate Court of Appeal, would be, I think, ill discharging its duty to the public if it were to listen to suggestions of minute differences which would not meet the ordinary apprehensions of mankind, and which would necessarily or naturally lead to great discussion and litigation.

It has been determined, upon the construction of the last statute, and quite rightly determined, that there must be a subscription by two witnesses after the testator has signed the will in their presence, or acknowledged his signature in their presence. In this case, the testator acknowledged his signature in the presence of two witnesses, but it is certain that there was not here a subscription, after the testator had so acknowledged the will, by Mr. Wilson, one of the witnesses, unless his putting a mark across the letter "*F*" (or "*T*" as it would have stood without the cross) amounts to a signature by him. Upon that subject, I entirely concur with my noble and learned friend, for I do not think that you could suppose any thing so absurd as that when he

wrote the words Frederick William Napoleon Wilson in the morning, he did not mean that to be his signature, but that he intended the mark, which he afterwards put, to be his signature; but unless you suppose that, there was no subscription by Mr. Wilson after the acknowledgment by the testator, in the presence of two witnesses, that that was his will. His putting the cross to the letter "*F*" in the afternoon cannot be said to be his subscription. The acknowledgment of his signature by a testator is sufficient, but a witness stands in a different position. After the signature of the will by the testator his acknowledgment will do; but by the
* 170 express terms of the * statute, that will not do with regard to the witness. If he had said nothing at all, the putting a mark across the "*F*" might have amounted to an acknowledgment of his signature; but that will not do, and yet the facts here cannot amount to more than that.

Upon these short grounds, for the case lies within a very narrow compass, I concur with my noble and learned friend, that this instrument cannot be taken to be a will duly executed by this alleged testator.

Lord Chelmsford. — I regret to have to agree with my two noble and learned friends, that the will was not duly executed, as required by 1 Vict. c. 26. To render a will valid, the signature or acknowledgment of the testator must be in the presence of two witnesses, present at the time, and the witnesses must attest and subscribe the will in the presence of the testator. Now, upon witnessing the will in the forenoon of the day of its execution, Mr. Wilson subscribed his name, intending that it should be a complete signature. It was, of course, insufficient as a complete subscription under the Act, because only one witness was present, and if it had been left without any thing more having been done by Mr. Wilson, no question of the imperfect attestation and subscription of the will could possibly have existed. And the question is, whether what was done in the afternoon, when a second witness was present, would make a complete attestation and subscription.

Mr. Wilson certainly intended to subscribe as a witness in the afternoon. But he thought that adding the date was equivalent to a repetition of the signature. Did this amount to a second subscription? Suppose Mr. Wilson had not subscribed his name in the morning, and in the afternoon had merely put the

date, could that have * been considered to be such a sub- * 171
scription as the Act requires? The subscription must mean such a signature as is descriptive of the witness, whether by a mark or by initials, or by writing the full name; and if the date alone would not do, of what efficacy can it be towards completing the subscription?

If Mr. Wilson in the morning had left his signature incomplete by the omission, for instance, of his surname which he had added in the afternoon, that would have been a subscription which would have satisfied the requisitions of the Act. For there would really have been only one complete subscription. But the omission of the cross to the "F" in his Christian name, did not make the signature imperfect. For Mr. Wilson states, that he very often omitted to put the cross at all; and he did not add the cross to complete his signature, so as virtually to subscribe anew, but merely in pursuance of his habit of supplying the omission when he noticed it.

The words of the Act appear to me to be quite clear in prescribing what shall be necessary to render a will valid. And of course no equivalent can be substituted for its plain requisitions. However much, therefore, we may regret that the will of the testator should be disappointed by an accidental omission, where all parties intended to comply with the directions of the Act, yet we are bound by the express and clear language of the Legislature; and, however reluctantly, we are compelled to pronounce the will to be invalid.

THE LORD CHANCELLOR.—The Appeal will be dismissed without costs.

Decree affirmed, and appeal dismissed without costs.

Lords' Journals, March 11, 1861.

*172 * DRAKE *v.* DRAKE AND OTHERS.

1860. Feb. 27, 28.

MARY FRANCES TYRWHITT DRAKE, *Appellant.*
FREDERICK W. T. DRAKE and others, *Respondents.*[1]

Will. Uncertainty. Name. Description. Evidence.

A name and a description of a legatee were given in a will, which, taken together, could not be applied to any one person; evidence of the state of the family was admitted, and an affidavit of the solicitor who prepared the will was offered to show what had been the cause of the mistake:—

Held, that this affidavit was not admissible in evidence.

A testator devised a life interest in an estate to his "*sister Mary Frances T. D.:*" he had no sister, but he had a sister-in-law, of that name. After making other devises and bequests, he gave the residue equally among four persons, one of whom was thus named and described, "my *niece Mary Frances T. D.*" He had no niece who bore those two names conjointly; he had nieces who bore one or other of those names:—

Held, affirming the judgment of the Court below, that the bequest as to the fourth part was void for uncertainty.

Sir Hugh Richard Hoare, bart., deceased, by his will dated 25th April, 1854, after devising a house in Eaton Square to a nephew, gave a messuage and hereditaments, with the furniture therein, at Burnham, in the county of Buckingham, to "my sister, Mary Frances Tyrwhitt Drake," for life. He then made other devises and bequests, appointed Frederick William Tyrwhitt Drake and two other persons, his executors; and finally gave the residue of his real and personal estate to "the said Frederick William Tyrwhitt Drake, John Palmer, my niece, Mary Frances Tyrwhitt Drake, and Jane Labbett, equally between them." The testator died in January, 1857. At the time of his will and his death, he had no sister nor niece with the names of Mary Frances Tyrwhitt Drake. His only relation who did bear those names was the appellant, who was not his sister but his sister-in-law, and *173 she, therefore, *claimed to be the person intended by the will. The claim was disputed, and the respondents, the

[1] Malcolmson *v.* O'Dea, 10 H. L. Cas. 606; Lyle *v.* Richards, Law Rep. 1 H. L. 228.

executors, in October, 1857, filed their bill in Chancery for the purpose of having the question of construction decided. In January, 1858, an inquiry was directed to ascertain who was the heir at law, who the next of kin, and what sisters and what nieces there were alive at the time of the testator's death. The Master found as to the last two subjects of inquiry, that the testator had only two sisters, Jane Lethbridge and Frances Ann Hoare, and two sisters of his wife, namely, the appellant, and Louisa Isabella Partridge, and eleven nieces of his own, and twenty-three nieces of his wife, four only of whom bore either of the Christian names mentioned in the will, namely, Frances Isabella Drake, Mary Caroline T. Drake, Frances Charlotte T. Drake, and Mary Elizabeth T. Drake. The last named lady formally disclaimed all interest.

An amended bill was then filed. Evidence was adduced, and amongst other affidavits the appellant proposed to file an affidavit by Mr. Henry Messiter, the solicitor who prepared the will, in which the deponent set forth the instructions he had received for that purpose. On the hearing, this affidavit was rejected; and, on the 15th July, 1858, the Master of the Rolls declared that, according to the true construction of the will, the residue was to be divided into four parts, and "that the gift of one of such parts to the testator's niece, 'Mary Frances Tyrwhitt Drake,' is void for uncertainty," and decreed and gave directions accordingly.[1] The appeal was brought against this decree.

Mr. R. Palmer and *Sir H. Cairns* (*Mr. Surrage* was with them) for the appellant. — The Master of the Rolls rejected the affidavit of * Mr. Messiter, who prepared the will, and * 174 whose affidavit would have cleared up any possible doubt on the subject.[2] That affidavit ought to have been received first, be-

[1] 25 Beav. 642.

[2] Mr. Messiter's affidavit, which was printed in the Appendix to the Case laid on the Table of the House, said, that on his last interview with the testator about executing the will, "when I came to the residuary clause, I asked him to whom he wished to give his residuary estate, and he said to Frederick William Tyrwhitt Drake, John Palmer, Miss Drake and Jane Labbett. I then asked him whom he meant by Miss Drake, and he answered: The person who has the life interest in Burnham Grove; he gave no farther description of any of those four persons; in writing their names in the draft, I erroneously called the said Mary Frances Tyrwhitt Drake, the testator's niece, and so misdescribed her."

cause it explained how the will came to be in the state in which it is now found; and secondly, that on the hypothesis that there are more than two persons of one name, it is right that there should be evidence to show which of the two was meant. In *Selwood* v. *Mildmay*,[1] a testator gave four per cent. bank annuities; he had none, nor any four per cent. stock; but he had long annuities, and evidence of the instructions he had given for the preparation of the will was admitted by Sir R. Arden, then Master of the Rolls. That case was criticised in *Hiscocks* v. *Hiscocks*[2] as "being only a wrong application of the facts to a correct principle of law." But, in *Lindgren* v. *Lindgren*,[3] Lord Langdale treated it as good law. There a testatrix bequeathed three per cent. consols. At the date of the will or the death, she had no such stock in the bank books, having a few years before sold it out, and lent the money to the plaintiff, who paid her the same interest for it. Evidence was there allowed, to show how the mistake arose, and Lord Langdale made a decree in the same form as in *Sel-*
*175 *wood* v. *Mildmay*, the meaning of * which he said had been misapprehended in *Hiscocks* v. *Hiscocks*, and also in *Miller* v. *Travers*.[4] [Lord CHELMSFORD.—That was a strong case, for, after all the explanation given, there was nothing to satisfy the description in the will. THE LORD CHANCELLOR.—You may call on us to overrule *Hiscocks* v. *Hiscocks*, but it seems to me entirely in point.] It is submitted that it ought to be overruled. In *Bennett v. Marshall*,[5] the testator devised to "William Marshall, my second cousin." He had no second cousin, but he had two first cousins once removed, one of whom was named William Marshall, and the other William John Robert Blandford Marshall, and Vice-Chancellor Wood received evidence of that fact, and of the intention of the testator. Sir James Wigram, in his book on Extrinsic Evidence, thus sums up the law:[6] "From these judgments, it will appear that the decisions have affirmed the doctrine that, where the description in the will of the *person* or *thing* intended, is applicable with legal certainty to each of several subjects, extrinsic evidence is admissible to prove which of such subjects was intended by the testator."

Then as to the other point. The appellant here is the person

[1] 3 Ves. 306.
[2] 5 M. & W. 363, 370.
[3] 9 Beav. 358.
[4] 8 Bing. 244, 252.
[5] 2 Kay & J. 740.
[6] S. 184, p. 160, last ed.

entitled to take. She is the only person who possesses the names used in the will. In construing wills of this sort, the first rule is to give effect to the will if possible, and not to avoid it for uncertainty. The mere misdescription of the appellant cannot affect the correctness of her designation. The second rule is, that *veritas nominis* will prevail when the superinduced description is merely erroneous as to the person named, without being itself a *vera demonstratio* as to any other person. Here no other * niece * 176 but one, named Anne, takes any thing, and she takes a specific gift. The description, therefore, is not a *demonstratio* as to her. The third rule is, that where a description consists of two parts, one of which would point to a particular person, but the other points to two different persons, extrinsic evidence is properly admissible, to show which of the two persons was intended. Thus, "I give to John, the eldest son of;" it is found that John is not the eldest son; then the question is, whether John or the eldest son is to take, and circumstances are receivable in evidence, to show who was meant. *Camoys* v. *Blundell.*[1] In the opinion which Mr. Baron Parke then delivered on behalf of the Judges, it is said,[2] "Where a devisee is described by his Christian and surname, and some other distinctive circumstance, and no person answers both descriptions, and there is nothing in the rest of the will or the admitted evidence to show what was meant, the name would prevail, and the descriptive circumstance would be rejected." *Bernasconi* v. *Atkinson*[3] proceeded on the same principle. That principle, that the misdescription of a legatee will not defeat a legacy given to him by name, had been laid down in *Standen* v. *Standen*,[4] and that was acted on in *Newbolt* v. *Pryce*;[5] *Doe* v. *Huthwaite*,[6] and *Mostyn* v. *Mostyn*,[7] are authorities to the same effect. In *Hodgson* v. *Clarke*,[8] the gift of the remainder was to Thomas, the eldest son, but Thomas was the youngest son. Vice-Chancellor Stuart held the devise void, but that decision was overruled by the Lord Chancellor on appeal. In *Ryall* v. *Hannam*,[9] the gift was to Elizabeth, daughter of A., but the only child of A. was * John, a son, and his children were held * 177

[1] 1 H. L. Cas. 778.
[2] 1 H. L. Cas. 786.
[3] 10 Hare, 345.
[4] 2 Ves. Jun. 589.
[5] 14 Sim. 354
[6] 8 Taunt. 306.
[7] 5 H. L. Cas. 155.
[8] 1 Giff. 139.
[9] 10 Beav. 536.

entitled; and in *Boys* v. *Bradley*[1] are observations to show that intestacy is the last result at which the Court will willingly arrive. *Fox* v. *Collins*[2] and *Adams* v. *Jones*[3] declare the same principle.

The *falsa demonstratio* here does not point to any person identified by the description. It cannot, therefore, favour the niece, Anne, as the Master of the Rolls supposed.[4] The name here being long and special, is a strong reason why it should prevail over an erroneous description, the more so as there is no other person of the same name, and no other person sufficiently identified by the description as to defeat the effect of the true and specifically written name.

THE LORD CHANCELLOR (LORD CAMPBELL) intimated that their Lordships were of opinion that Mr. Messiter's affidavit had been properly rejected.

Mr. Lloyd, and *Mr. C. R. Hoare*, for the heir at law. — The residuary gift is void for uncertainty as to one-fourth part. The error is in the name, not in the description contained in the residuary clause; the appellant could not be meant, for she had been before properly described as the testator's sister, by which he meant his wife's sister. The admitted evidence shows that the appellant was not a niece, and that there was a niece, Frances Isabella, who was always called, in the family, Fanny, who was a great favourite with the testator. The name, therefore, is entirely to be disregarded; but then the description *niece* is all that can be *178 attended to, and that has no application to *any niece in particular. In all the cases cited on the other side there were circumstances to account for and explain the difficulty, and the contest lay between two persons alone. That is not so here.

Mr. Follett and *Mr. Baggallay*, for Henry Arthur Hoare, one of the next of kin of the testator. — All the persons intended by the will to be benefited are introduced by a description, and here the testator has rendered it impossible for any one to know whom he really meant. In *Thomas* v. *Thomas*,[5] it is said by Lord Kenyon,

[1] 10 Hare, 389, 397.
[2] 2 Eden, 107.
[3] 9 Hare, 485.
[4] 25 Beav. 645.
[5] 6 T. R. 671, 676.

"there must be *constat de persona.*" If you have that, of course *falsa demonstratio* may be rejected, but that is not so here. Wigram on Extrinsic Evidence says,[1] "So a description, though false in part, may, with reference to extrinsic circumstances, be absolutely certain, or, at least, sufficiently so to enable a Court to identify the subject intended." But here it is the description which throws the matter completely into uncertainty. Now *Bradshaw* v. *Bradshaw*[2] shows that the name is not, as of course, to prevail over the description. If so, then the name here cannot be applied to any particular person, and the gift is void.

THE LORD CHANCELLOR (LORD CAMPBELL). — My Lords, this case has been very ably argued by the learned counsel on the part of the appellant, and I am sure that every thing that learning, ingenuity, and research could bring forward in support of their view has been brought before us; but, after having listened with great pleasure to their argument, I must say that I am not at all satisfied that their view is the correct one, and I think *that your Lordships ought to affirm the decree of the *179 Master of the Rolls.

It has been urged that there being a doubt as to who was meant by the words used here, evidence was clearly admissible to explain it; but in this case there has been no evidence laid before your Lordships, which I think can assist you in coming to a conclusion different from that which was come to by the Master of the Rolls. The evidence of Mr. Messiter, the solicitor who prepared the will, I think was properly rejected, and all the rest of the evidence that was given merely amounts to this: that the testator had great affection for his sister-in-law, and also that he had great affection for Anne Tyrwhitt Drake, and for Frances Isabella Tyrwhitt Drake, but no such evidence can at all assist us in coming to a right conclusion. And I see nothing that can warrant us in saying that the testator intended that his sister, Mary Frances Tyrwhitt Drake, should take the residuary estate under his will, unless the maxim which is contended for by the appellant should govern the case, that without any evidence whatever to prove error of demonstration, there is a rigid rule that the name should prevail. But, my Lords, I deny that there is any such rule. There is a maxim

[1] S. 67. [2] 2 Younge & C. Exch. 72.

that the name shall prevail against an error of demonstration; but then you must first show that there is an error of demonstration, and, until you have shown that, the rule *veritas nominis tollit errorem demonstrationis* does not apply. I think that there is no presumption in favour of the name more than of the demonstration. Upon referring to the numerous cases that have been cited at the bar, it will be found that there are more instances in which the demonstration prevailed than in which the name prevailed.

That being so, is there any thing here to show that the *180 *name shall prevail more than the demonstration? There is nothing. I agree with the Master of the Rolls, that it is impossible to say whether the testator meant Mary Frances Tyrwhitt Drake, or Anne Tyrwhitt, or Frances Isabella Drake; there is no evidence to show that he preferred the one to the other.

With regard to the argument that has been urged, that an intestacy is to be avoided, that is true where there is something to show what the intention of the testator is, whereby an intestacy can be avoided. In this case, I think there is nothing to show, looking at all the evidence and all the circumstances of the case, that he intended his sister, Mary Tyrwhitt Drake, to take the residue.

It seems to me that this disposes of the whole case, and I must therefore advise your Lordships to dismiss this appeal, with costs.

Lord Brougham. — My Lords, I entirely agree with my noble and learned friend in this case. This is a case such as I have rarely had come before me, in this respect, that there is so total a want of any thing to cast the balance in favour of one party rather than the other, that I think the gift must be held to be void for uncertainty. I have tried it in every way; I have examined all the particulars of the evidence that has been given, and have compared them with the different provisions of the will, and I am utterly unable to discover any one circumstance to turn the balance either one way or the other.

Lord Cranworth. — My Lords, I have come to the same conclusion as my noble and learned friends. I must make this *181 preliminary *observation, that I think your Lordships in

deciding this case are bound in duty to divest your minds entirely of that which it is rather difficult to divest yourselves of, namely, the inadmissible evidence which has been offered. Unquestionably, if that inadmissible evidence had been admissible evidence, the conclusion would have been irresistible that the sister was intended; but that is evidence with which we must not suffer our minds to be, as it were, poisoned, because we have no right to look at it. And, looking at the legitimate evidence, and at that alone, we find upon the face of the instrument the facts are merely these: He says, "my niece, Mary Frances Tyrwhitt Drake," and he names her as one of his residuary legatees. Now, he had no niece, Mary Frances, but he had a niece, Frances Isabella; both of them were in the habit of being called Fanny; and can we say that this niece Fanny was not intended as much as his sister Fanny? That is what we have to decide.

Our attention has been very properly and very ably called to a great many authorities upon the subject, but the point comes round to the single question, Is there any thing to enable us to say that our judgment ought to preponderate in favour of either the sister or the niece? There is nothing upon the evidence which leads my mind in either direction, and therefore I think, with the Master of the Rolls, that it is impossible to give effect to this part of the bequest, but that it must be held to be void for uncertainty.

Lord Chelmsford.—My Lords, in this case the designation, as a whole, does not fit any one person; but if either of the parts of which it consists (being a relative description and a personal * name) had stood alone, it would have been a *vera* * 182 *demonstratio* of some particular individual. The ambiguity of this designation, which does not appear upon the face of the will, is raised by extrinsic evidence, and, of course, by the same description of evidence may be removed. But the proof which has been adduced fails to show more than appears to be established by the will itself, viz., the sentiments of regard and affection which the testator entertained towards his sister-in-law, which may be considered to be manifested by the disposition in her favour. But there is the same, or even a greater, indication of regard, shown in a similar manner, to the only one of his nieces, who is distinguished from the rest by his will. And there is also evidence

given of another of his nieces, who bore the names of Frances Isabella Trywhitt Drake (being three out of the four names by which the intended legatee is described), having been an especial object of the testator's favour and affection, a circumstance which throws additional doubt upon the intention. It is thus left entirely in doubt whether the mistake, which clearly exists somewhere, has arisen in the use of the relative description, "my niece," or of the personal name, "Frances Mary Tyrwhitt Drake." The ambiguity, therefore, remains after all the means employed for removing it have been exhausted; and as it is impossible to fix upon the individual intended, an intestacy as to a fourth part of the residue is inevitable.

LORD KINGSDOWN concurred.

Decree, in so far as complained of, affirmed; and appeal dismissed, with costs.

Lords' Journals, 28th February, 1860.

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*183 *WING *v.* ANGRAVE AND TULLEY.

1860. February 6, 7, 29.

WILLIAM WING, *Appellant.*
RICHARD ANGRAVE, JOHN TULLEY, and Others, *Respondents.*[1]

Will. Death. Presumption of Survivorships. Union of Characters. Costs.

There is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause.

Nor is there any presumption of law that all died at the same time.

estion is one of fact, depending wholly on evidence, and if the evidence not establish the survivorship of any one the law will treat it as a matter able of being determined. The *onus probandi* is on the person asserting affirmative.

rsons, husband and wife, made their separate wills. In the husband's

[1] Bullock *v.* Downes, 9 H. L. Cas. 30.

will the property was given to his wife, "and in case my wife shall die in my lifetime," then to W. W. in trust for the children on their coming of age, and in case all of them should die under age, then to W. W. for his absolute use and benefit. In the wife's will (made under a power given by her deceased father, in default of the exercise of which the property was to go to relatives specifically named), the property was given to the husband (subject to interests in the children), "and in case my husband should die in my lifetime" then to W. W. absolutely. The husband and wife and two children perished at sea, being all swept off the deck by one wave, and all disappearing together: —

Held, that there was no presumption that the husband had survived the wife, or the wife the husband.

Held, also (Lord Campbell, Lord Chancellor, *diss.*), that on the true construction of the wills, it was necessary for W. W. to show affirmatively that one or the other had survived, and that in the absence of such proof, the property went to the relatives specifically named in the will of the wife's father, as if there had been no will by the husband, nor any appointment by the wife.

Held, likewise (Lord Campbell, Lord Chancellor, *diss.*), that the union of the characters of legatee under the husband's will, and appointee under the wife's will, did not place W. W. in a situation of greater advantage than if the two characters had been held by different persons.

The appeal was dismissed without costs.

THIS was a suit instituted by Richard Angrave, the respondent, for the purpose of having the trusts of the will * of John Tulley carried into execution, under the direction * 184 of the Court of Chancery.

John Tulley, by his will, demised and bequeathed all his real and personal estate to trustees, in trust, to convert the same into money; to apply the interest to the maintenance and education of his daughter and only child, Mary Ann, till twenty-one, or marriage, then to pay her 500*l.*; then, for her separate use, during her life; on her decease, for her children, to vest, as to sons, at twenty-one; as to daughters, at twenty-one, or marriage: if the children should all die before any interest vested in them, "on trust for such person or persons as his said daughter, notwithstanding coverture, by her last will, should direct and appoint, and in default of, or subject to any such direction or appointment, in trust for" his sister, Jane Chart, and his brothers, T. and G. Tulley, and his sister, Mary Tulley.

The testator died on 12th October, 1832, leaving his daughter and Jane Chart, and the others who were to take, in default of appointment, him surviving. This will was operative only as far as personal estate was concerned. In June, 1834, Mary Ann

Tulley married John Underwood. There were three children issue of the marriage, a daughter, Catherine, born in 1835, and two sons born in 1838 and 1840. By orders of the Court of Chancery the trust estate, on the death of John Tulley's first executors, became vested in the appellant, William Wing, and the respondent Richard Angrave.

On the 4th October, 1853, Mary Ann Underwood, by her will, duly made and attested, under the power contained in her father's will, appointed all the property she took under that will as follows:

"unto, and to the use of my husband, John Underwood, * 185 his heirs, executors, administrators * and assigns, according to the natures and qualities thereof respectively (subject to the estates and interests of my children therein, under or by virtue of the will of the said John Tulley, deceased); *and in case my said husband should die in my lifetime*, then I devise, bequeath, and appoint the said hereditaments, &c., unto and to the use of William Wing, of No. 163, Bond Street, in the county of Middlesex (meaning the appellant), his heirs, executors, administrators, and assigns, to and for his and their own absolute use and benefit." She named her husband and Wing executors of the will.

John Underwood, on the same 4th day of October, 1853, duly made his will, and thereby devised and bequeathed the whole of his real and personal estate as follows: "unto and to the use of William Wing, of 163, Bond Street, in the county of Middlesex, watchmaker, his heirs, &c., according to the several natures and qualities thereof respectively, upon trust, for my wife, Mary Ann Underwood, her heirs, &c., absolutely; and *in case my said wife shall die in my lifetime*, then I direct that my said real and personal estate shall be held by my said trustee, upon trust, for my three children, to be equally divided among them; and, in case all of them shall die under the age of twenty-one, being sons, or unmarried, being a daughter, then I give and devise all my real and personal estate unto and to the use of the said William Wing, his heirs, &c., to and for his and their own absolute use and benefit." [illegible]e named his wife and the appellant, William Wing, his ex[illegible]t and executor.

[illegible]he 13th day of October, 1853, John Underwood and his wife [illegible]eir three children, embarked together in the Dalhousie, an [illegible] emigrant ship, bound on a voyage to Australia, and on the 19th day of October following, the ship * was wrecked off

Beachey Head, and the father, mother, and three children were all drowned at sea.

Wing proved the wills of both John Underwood and his wife; and Mrs. Underwood, senior, in January, 1854, took out letters of administration to the goods of her grand-daughter, Catherine, who was seen alive after her parents had perished. In the same month she filed a bill against Wing, praying for an account of the personal estate of John Underwood, and of the separate personal estate of his wife, and that her own rights as administratrix of Catherine in the residue of the two personal estates might be ascertained and declared. The bill alleged that in the events which had happened no beneficial right in the personal property vested in Wing. The answer was filed in February, 1854, and evidence was taken on the subject of the deaths of Mr. and Mrs. Underwood and their children.

John Reed, the only person who escaped from the wreck, stated that the vessel in which John Underwood and his wife, with their three children, sailed for Australia, foundered in the British Channel, about sixteen miles to the south-west of Beachy Head, on the 19th of October, 1853, and that every person on board, except the witness, perished. That for some time previously to sinking, the ship was lying on starboard beam ends; and that, while so lying, John Underwood and Mary Ann, his wife, and two of the children, namely, Frederick and Alfred, were all standing together on the quarter gallery, "I don't believe it was a minute before a sea came and swept them all off; they seemed to go off all at once; I don't think they were separated. I saw no more of them." When struck by a wave, they were carried by such wave over the stern of the vessel into the sea. "They were clasped together in this manner; the boys had hold of the mother, and * the * 187 father had his arms round them all; and they were in that state when the sea swept over the vessel; that was the last I saw of them." Catherine Underwood (the other child) was not with her parents and brothers when they were so swept from the vessel; she was lashed by Reed to a spar, but she also perished very shortly afterwards; but he saw her hanging upon the spar, and, as he thought, alive, after he had lost sight of them.

Mr. Wotton, a medical man (examined on the part of the plaintiff), explained the process of drowning. In his opinion, assuming the four persons in question to have been in a continued state of

submersion, death would take place in the case of all in two minutes at the outside. Two persons, both in health, being totally submerged at the same moment, asphyxia would ensue in the case of each at the same instant, as nearly as he could conceive. A person of seventy would live as long in such circumstances as a person of thirty, assuming them both to be in health, and a female as long as a male, and a weak man as long as a strong one. After hearing the evidence of Reed, he could not, medically or physiologically, give any opinion whether Mr. or Mrs. Underwood was the survivor; after asphyxia it was possible that some of the vital functions might continue for two minutes; they would not continue longer in the case of a strong than in the case of a weak man, nor in the case of a man than in that of a woman.

Mr. Hancock, another medical man, agreed with these opinions.

Dr. Alfred Swaine Taylor, examined on the part of the defendant, said, that a male, *cœteris paribus*, resisted the asphyxiating cause more than a female; in the case of a simultaneous submersion, the consciousness of the power to swim would operate
* 188 in his favour; that in the case of * two persons, neither of whom could swim, the stronger would have the advantage; that assuming two persons of equal strength to be submerged at the same moment, and to undergo total and uninterrupted submersion, they would not die at precisely the same instant of time; that asphyxia might, possibly, supervene in both at the same instant of time, but asphyxia was not death; the interval between asphyxia and death would depend on the physical strength of the person, varying with sex and age, and healthy and unhealthy state of body. After hearing Reed's evidence read, Dr. Taylor said, "I should take the medical presumption to be that the father survived the wife and two boys. That presumption would be increased if the father was a good swimmer and if the wife was in a sickly state of health; I think that would lead to her sinking without exertion." Mr. Brenton and Mr. Paget, two other medical witnesses, stated their full concurrence with the opinion of Dr. Taylor. It was proved by witnesses who had known Mr. and Mrs. Underwood, and could speak to their state of health and general habits, that the former had been born in 1810, was a robust, healthy man, and a good swimmer, and the latter, who had been born in 1813, was in a weak state of health, and was quite unable to swim.

The appellant insisted, that if John Underwood survived his wife, he, the appellant, was entitled to the trust estate as his legal personal representative; and that, if John Underwood died before his wife, then he, the appellant, was entitled to the trust estate as appointee under her said will. The appellant also insisted that the testatrix, Mary Ann Underwood, intended the bequest in his favour to take effect in case the gift in favour of her husband, the said John Underwood, should fail; and that, under the circumstances, it was not probable, and would be unreasonable to * pre- * 189 sume, that both of them, John Underwood and Mary Ann his wife, died at the same moment of time, and that it would not be reasonable to presume that they had so died, especially as the effect of so doing would be entirely to defeat the will of the said testatrix, Mary Ann Underwood.

The cause of *Underwood* v. *Wing* came on to be heard before the Master of the Rolls, who, in July, 1854, made a decree declaring that the respondents, the Tulleys, were entitled in equal shares to the residuary personal estate of the testator, John Tulley, and accounts were ordered, and farther directions reserved.[1]

This decree was appealed against, and the appeal was heard in February, 1855, by the Lord Chancellor (Lord Cranworth), in the presence of Mr. Justice Wightman and Mr. Baron Martin, and the decree was affirmed.[2]

In June, 1855, Mr. Angrave filed his bill against Wing and the Tulleys, praying that the trusts of the will of John Tulley might be declared, and all proper directions given. The cause was heard, and a decree similar to the former was made on the 16th November, 1857. The present appeal was then brought, both the suits being treated as involving the same question, so far as Wing was concerned.

Mr. Roundell Palmer and *Mr. Speed* for the appellant. — On the evidence here, the only proper conclusion to draw is, that the husband survived the wife. This is a presumption of law, *Colvin* v. *The King's Proctor*.[3] But independently of that presumption, there can be no doubt that the evidence proves the power of vitality in the husband * to have been greater, and also * 190 shows circumstances, such for instance as his being a strong

[1] 19 Beav. 459.
[2] 4 De G., M. & G. 633.
[3] 1 Hagg. Eccl. 92.

man, and a good swimmer, which lead irresistibly to the conclusion that he was the survivor. Such circumstances have always been admitted as guides to the decision of the Courts: *Broughton* v. *Randall*,[1] where, in the case of two persons hung at the same moment, the shaking of the legs was admitted as proof of the longer continuance of vitality. *Sillick* v. *Booth*[2] is also an important authority to the same effect. There the father was in England; the two sons were on ship board; they were coming from the West Indies to England together; the ship was lost in the hurricane months; one of the two sons was under age, the other was twenty-eight, and it was held that the elder, being the stronger, and also the more accustomed to the sea, survived the other; and it was there distinctly stated that, "by the law of England, evidence of health, strength, age, or other circumstances may be given in cases of this nature, tending to the judicial presumption that one party survived the other." On the principle there laid down, the present case ought to be decided. That principle was acted on in *Ommaney* v. *Stilwell*,[3] where two persons, father and son, the latter being a strong young man, accompanied Sir John Franklin's expedition, and perished with him; and it was held that the presumption of fact was in favour of the survivorship of the younger and stronger man.

Then as to the construction of the will: the appointment must be read as if it was introduced into the will of Tulley. Assuming that the husband or the wife survived the other, the appellant must, in either case, be entitled. He represents the hus-
*191 band, and he also represents the wife. *He is the executor and ultimate legatee of the husband, and he is the appointee of the wife. On him, therefore, the *onus probandi* does not lie, for there is no contest as between the husband and the wife, or their respective representatives, but as between them and other persons. These other persons must make out their title. The appellant is executor and legatee. Where a trustee holds as against the Crown real estate, he will continue to hold it, *Burgess* v. *Wheate*.[4] Under both these wills, there is the same disposition of property. In both, Wing is the executor; and in both the property is absolutely given to him if the dispositions in favour of the husband and children, or in favour of the wife and children, should fail. Under

[1] Cro. Eliz. 502.
[2] 1 Younge & C. Ch. 117.
[3] 23 Beav. 328.
[4] 1 Eden, 177, 1 W. Bl. 123.

the will of Mr. Underwood, if the wife died in his lifetime, and the children died under twenty-one, or marriage, the appellant is entitled to the property; he is also entitled to it if Mr. Underwood died in the lifetime of his wife: *quocunque modo*, therefore, the appellant is entitled. It was not considered in the Court below that if a title must be in a particular person in one of two modes, and the negative of one involves the affirmative of the other, the right of any third person in opposition to both is at an end. Nay, in a case of this kind, if the deaths are simultaneous, still each might be said to die during the lifetime of the other, within the meaning of the language used in the will. [LORD WENSLEYDALE. —Then you translate "die in my lifetime," as equivalent to "shall not survive."] That is so. On the general failure of the first estate, the property goes over. It was argued at the Rolls only on the evidence, not on the construction of the will. On construction, the case is clearly in favor of Wing. It was plainly the intention of the testatrix to prevent a lapse, and to give to the appellant what she would have given * to her hus- * 192 band had he survived her, for nothing could prevent the husband from taking, except his dying in her lifetime. Now a lapse was the only thing that could occasion a failure of this gift, and that was provided against.

The Lord Chancellor, in his judgment in the Court below, refers to this point,[1] and says, that the cases cited before him on it form two classes, and "all proceeded on the doctrine that the event on which the gift over was to come into operation, was an event implied by, if not expressly indicated by, the language used in the will." That principle applies here, for in each will there is the plainest implication, if not, indeed, the clear expression of an intention, that should the gift as to the husband or to the wife fail, the property shall go to Wing. Intention is to govern, and here no one can doubt what was the intention of each will-maker. Intention as the rule to govern was the principle in very ancient times, and as Vice-Chancellor Wood, in *Warren* v. *Rudall*,[2] declared, was that which was so admirably expressed in the case of *Curius* v. *Coponius*,[3] and which he entirely adopted. Here, not perhaps in words, but certainly in substance, is a provision for the events that have happened. "If he shall die in my lifetime" was a

[1] 4 De G., M. & G. 662, 664. [2] 4 Kay & J. 603, 610.
[3] Cic. Orat. pro Cæcina, c. 18, De Orat. lib. 1, c. 39.

given of another of his nieces, who bore the names of Frances Isabella Trywhitt Drake (being three out of the four names by which the intended legatee is described), having been an especial object of the testator's favour and affection, a circumstance which throws additional doubt upon the intention. It is thus left entirely in doubt whether the mistake, which clearly exists somewhere, has arisen in the use of the relative description, "my niece," or of the personal name, "Frances Mary Tyrwhitt Drake." The ambiguity, therefore, remains after all the means employed for removing it have been exhausted; and as it is impossible to fix upon the individual intended, an intestacy as to a fourth part of the residue is inevitable.

LORD KINGSDOWN concurred.

Decree, in so far as complained of, affirmed; and appeal dismissed, with costs.

Lords' Journals, 28th February, 1860.

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*183 *WING v. ANGRAVE AND TULLEY.

1860. February 6, 7, 29.

WILLIAM WING, *Appellant.*
RICHARD ANGRAVE, JOHN TULLEY, and Others, *Respondents.*[1]

Will. Death. Presumption of Survivorships. Union of Characters. Costs.

There is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause.

Nor is there any presumption of law that all died at the same time.

The question is one of fact, depending wholly on evidence, and if the evidence does not establish the survivorship of any one the law will treat it as a matter incapable of being determined. The *onus probandi* is on the person asserting the affirmative.

Two persons, husband and wife, made their separate wills. In the husband's

[1] Bullock v. Downes, 9 H. L. Cas. 30.

will the property was given to his wife, "and in case my wife shall die in my lifetime," then to W. W. in trust for the children on their coming of age, and in case all of them should die under age, then to W. W. for his absolute use and benefit. In the wife's will (made under a power given by her deceased father, in default of the exercise of which the property was to go to relatives specifically named), the property was given to the husband (subject to interests in the children), "and in case my husband should die in my lifetime" then to W. W. absolutely. The husband and wife and two children perished at sea, being all swept off the deck by one wave, and all disappearing together: —

Held, that there was no presumption that the husband had survived the wife, or the wife the husband.

Held, also (Lord Campbell, Lord Chancellor, *diss.*), that on the true construction of the wills, it was necessary for W. W. to show affirmatively that one or the other had survived, and that in the absence of such proof, the property went to the relatives specifically named in the will of the wife's father, as if there had been no will by the husband, nor any appointment by the wife.

Held, likewise (Lord Campbell, Lord Chancellor, *diss.*), that the union of the characters of legatee under the husband's will, and appointee under the wife's will, did not place W. W. in a situation of greater advantage than if the two characters had been held by different persons.

The appeal was dismissed without costs.

THIS was a suit instituted by Richard Angrave, the respondent, for the purpose of having the trusts of the will * of John Tulley carried into execution, under the direction * 184 of the Court of Chancery.

John Tulley, by his will, demised and bequeathed all his real and personal estate to trustees, in trust, to convert the same into money; to apply the interest to the maintenance and education of his daughter and only child, Mary Ann, till twenty-one, or marriage, then to pay her 500*l.*; then, for her separate use, during her life; on her decease, for her children, to vest, as to sons, at twenty-one; as to daughters, at twenty-one, or marriage: if the children should all die before any interest vested in them, "on trust for such person or persons as his said daughter, notwithstanding coverture, by her last will, should direct and appoint, and in default of, or subject to any such direction or appointment, in trust for" his sister, Jane Chart, and his brothers, T. and G. Tulley, and his sister, Mary Tulley.

The testator died on 12th October, 1832, leaving his daughter and Jane Chart, and the others who were to take, in default of appointment, him surviving. This will was operative only as far as personal estate was concerned. In June, 1834, Mary Ann

*198 individuals, who perished by the same calamity, *survived, there is no inference of law from age or sex, and the question is to be decided upon the circumstances proved in each particular case. In the present case, if the question had been tried by a Judge governed by the Code Napoleon, he must have treated it at first as a question of fact, to be decided by the circumstance in evidence, for the incidents of the shipwreck are detailed by an eye-witness, who saw both the husband and the wife carried off by the fatal wave in which they perished. According to the Code Napoleon, "*la présomption de survie est déterminée par les circonstances du fait, et à leur defaut, par la force de l'âge ou du sexe.*" Therefore, till the Judge had come to the conclusion that the circumstances proved established a perfect equipoise, he could not have resorted to the presumption of law, which, in the absence of satisfactory evidence, he is bound to respect. But with us such a question is always from first to last a pure question of fact, the *onus probandi* lying on the party who asserts the affirmative.

The appellant certainly did give some evidence, from the different sex, age, and state of health of the husband and wife, upon which, if not counterbalanced, the Judge would have been justified in finding that the husband was the survivor. But there was contrary evidence of a very grave character, and I cannot say that the two Judges erred in declaring that the appellant had not proved satisfactorily that the husband was the survivor, so that under the wife's appointment the property had vested in him.

This being a pure question of fact, I do not think that we can derive any assistance from any of the numerous cases cited, where Judges have held evidence to be sufficient or insufficient to satisfy them that one of two individuals who perished from the *199 same calamity was the *survivor. Treating this as a pure question of fact, if there had been a clear preponderance of evidence to support the inference that the husband survived, I should not have shrunk from drawing that inference, and now advising your Lordships to decide this question of fact in favour of the appellant. But I can by no means take upon myself to say, that the Master of the Rolls and the Lord Chancellor were wrong; I myself should probably have come to the same conclusion. I have entertained a hope that by an improved procedure in Courts of equity such questions of fact might be definitely settled in those Courts, either with or without a jury, and that upon ques-

tions of law only would an appeal be permitted to this high tribunal.

I need hardly say, that I think there is no foundation for the doctrine, erroneously imputed to the Master of the Rolls (for it seems that he never laid it down), that where it is left doubtful which of two individuals died first, there is a presumption of law (*juris et de jure*) that they died at the same point of time. I will not say that this is impossible, although time, like matter, is said to be infinitely divisible, but such a presumption is not warranted by decision, by *dictum*, or by analogy.

The counsel for the appellant, secondly, contended, that judgment being given against the appellant on his claim under the husband's will, he is entitled, independently of that will, to succeed under the will of the wife, by which it is said that she clearly indicates her intention, that if the appointment in favour of her husband should fail, the appointment in favour of William Wing should take effect. Her language is, "and in case my said husband should die in my lifetime, then I appoint to the use of William Wing, his heirs, &c., to and for their own absolute use and * benefit." Is this to be considered merely a bequest to * 200 William Wing on the condition of proof being adduced that the husband of the testatrix died in her lifetime? Is this a bequest on the happening of a particular event? If so, the decision against William Wing, the appellant, was right; for he has not proved that this condition was fulfilled, that this event did happen.

But there is a class of cases decided by very eminent judges, beginning with *Jones* v. *Westcomb* before Lord Chancellor Harcourt, and coming down to *Warren* v. *Rudall* before Vice-Chancellor Page Wood, which establishes the doctrine that where by a will property is given over, on the failure in a particular manner of a prior gift, and the will shows that it was the testator's clear and certain intention that the devisee or legatee over should take on failure of the prior gift, howsoever that gift may fail, the devisee or legatee shall take on failure of the prior gift, although the prior gift fails in a manner different from that specified in the will. These cases are all reviewed and ably commented upon in *Warren* v. *Rudall*, by Vice-Chancellor Page Wood, who adds[1] the case of *Curius* and *Coponius*, which was argued by Scævola and Crassus,

[1] 4 Kay & J. 610. And see 3 Burr. 1623, 1624.

and is reported by Cicero.[1] There the testator, believing that his wife was *enceinte*, devised his estate to the child *en ventre sa mère*, and if such child should die within age, then over. The wife never had been *enceinte*. This was argued, as the present case has been, to be a bequest on condition, on the happening of the particular event of the child dying within age. But held, by the *Prætor*, that the gift over took effect, the prior gift having failed, although not in the manner contemplated by the testator. Asks the reporter, "*Quid? verbis satis hoc cautum erat? Minime.*

Quæ res igitur valuit? Voluntas; quæ si tacitis nobis
*201 *intelligi *posset, verbis omnino non uteremur; quia non*
potest, verba reperta sunt, non quæ impedirent, sed quæ indicarent voluntatem."

The cases relied upon by the counsel for the respondents seem to me either consistent with this rule, or cases where the rule was overlooked without being overruled. Of course, I fully recognize all the cases where, there being in a will a gift really meant to be on condition, or the happening of a particular event, the Court decided that it could not take effect unless the condition was performed, or the event had happened.

But the present seems to me to be a case of *substitution;* to take effect on failure of the prior estate. This being an appointment under a power, the will which created the power, and the will in execution of the power, must be taken together, and the limitations may be considered substantially to be first to Mary Ann, the daughter, for life, then to her children, to vest at twenty-one or marriage; in case none of her children should take a vested interest, then to her husband; and in case her husband should not take, then to William Wing. She says, "in case my said husband should die in my lifetime." But his death in her lifetime was the only contingency she contemplated by which the estate given to her husband could possibly fail of taking effect. The only other contingency was that husband and wife should die at the same point of time; and her intention to leave the property to William Wing, failing the gift to her husband taking effect, is to be defeated because she did not say "in case my said husband should die in my lifetime, or in case my said husband and I, the said Mary Ann, the wife of my said husband, should die at the same point of time,

[1] Ubi ante, p. 192, n, (*j*).

or it should be uncertain which of us dies first, whereby my gift to my said husband shall not take effect," then over to William Wing.

* A Judge is to construe, and not to make a will; and * 202 if an event has happened for which a testator has not provided, from not having foreseen it, although if he had foreseen it there is a strong probability that he would have provided for it in one particular way, his supposed wishes shall not prevail, *quod voluit non dixit;* we are to give effect to the expressed, not the conjectural or probable, intention of testators. But looking to this will, does not the testatrix clearly express her intention, that if her husband did not take the property William Wing should take it? The lapse of the bequest to her husband by his predecease being substantially the only event upon which the bequest to him could fail, when she says, "in case my said husband should die in my lifetime," does she not, in substance say, in case the bequest to my husband should fail, then William Wing is the object of my bounty, and all shall go to him? She has not provided for the event of there being an impossibility to determine whether she or her husband died first. But although she has not in terms provided for this event, she has clearly intimated her intention, that in case of the gift to her husband not taking effect, the ulterior gift to William Wing should take effect. And this seems to me not to be an interpolation into her will, but a necessary implication from what she has said. How can it be supposed that if she had foreseen the event of an uncertainty as to whether she or her husband died first, so that her husband could not take from that uncertainty, she would have altered the intention she had so plainly expressed in favor of William Wing? Can it be considered possible that William Wing would, in that event, have ceased to be the object of her bounty? What other destination of the property, by her, can be conjectured? If her husband should not take, William Wing was substituted for him. *Quid? verbis satis hoc cautum erat? Minime.* * *Quæ res igitur valuit?* * 203 *Voluntas.* Words are here found which abundantly indicate the intention of the testatrix. Regard being had to these words, it seems to me to be a fallacy to say that this was a gift merely on the happening of a particular event, unless that event is taken to be the failure of the prior gift to her husband.

It has been objected that there is no proof that the gift to the

husband has failed. But with great submission, the failure of this gift is *res judicata*. In this administration suit, to which all who are interested are parties, Wing, as legatee and executor of John Underwood, claimed the property under the appointment by the wife in favour of her husband; that claim has been solemnly overruled on the ground that there is no evidence of the husband having survived the wife; and, moreover, there is a decree in favour of the legatees, who were to take in default of appointment. That decree standing, the claim under the gift to the husband is for ever barred, and it must be considered that no interest in the property in question ever vested in him for the most minute particle of time, or, in other words, that the gift to the husband entirely failed. The decree must be considered as containing a declaration to that effect, to justify the adjudication with which the decree concludes: "that those who were to take in default of appointment are absolutely entitled in equal shares to the residuary personal estate of the testator John Tulley."

The gift to the husband having failed, I think that the gift to Wing ought to prevail; this gift having been on failure of the gift to the husband, not conditional on proof being adduced that the gift to the husband failed by lapse.

In this way the appellant's case seems to me to be made out, without any aid from the husband's will. But, taking into
* 204 consideration that the appellant is legatee under the * will of the husband, as well as appointee under the will of the wife, and that he is the personal representative both of the husband and the wife, there is another way of putting his case to which I am not aware of any answer that can be given. Indeed this appears to me (with great deference) to amount to a demonstration that the parties to whom the property has been adjudged cannot be entitled to it.

The respondents must admit that they are not entitled, and that the appellant is entitled, first, if the husband survived the wife, under the husband's will; secondly, if the wife survived the husband, under the appointment by the wife, or, thirdly, if the husband and wife died at the same point of time, there being then a clearly established failure of the gift to the husband. In the nature of things, one of these three events must have happened, and in no other way can it be suggested that the deaths of the husband and wife could have occurred. If one of those events must have hap-

pened, and on the happening of any one of them the appellant is entitled, how can the parties put into possession of the property be entitled? Their *primâ facie* title is to prevail till a better is shown. But does not the appellant show a better when he proves that he is entitled on the happening of any one of three events, and that, with the certainty of fate itself, one of these three events must have happened?

It has been admitted, and I consider it incontestible, that on proof of the husband and wife having died at the same point of time, the gift of the appellant would take effect, that being conclusive to show that the gift to the husband had failed. A technical objection may be made to this last mode of putting the appellant's case, that it depends upon the accident of his being the legatee and representative of both husband and wife, and that these separate titles might have been in different individuals. But in ejectment, * separate titles in different individuals are allowed to be * 205 joined in the same suit, and the last Report of the Common Law Commissioners recommends that this procedure should be extended to other actions.

Upon the whole, I am bound to say, that, after great deliberation, I have come to the clear conclusion, that the decree appealed against ought to be reversed. However, having reason to believe that a majority of the members of your Lordships' House who heard the argument upon the appeal are of a different opinion, I must of course advise your Lordships, that the appeal should be dismissed.

Lord Cranworth. — My Lords, the question for decision in this case is nearly the same as that which was decided in the Court of Chancery in *Underwood* v. *Wing*, when I had the honor of holding the Great Seal. If that decision was wrong, the decree of the Master of the Rolls, now under review, certainly ought to be reversed. Even if the former was right, the appellant contends that there is a distinction between the two cases which entitles him to a reversal of this decree.

The facts of the case have been so fully detailed by my noble and learned friend on the Woolsack, and are so fully before your Lordships, that I need not detain you by adverting to them.

The case of *Underwood* v. *Wing* was a suit, by the representative of the next of kin of the husband, against Mr. Wing as his

personal representative, claiming his residuary personal estate, on the ground that he had died intestate as to that residue; no conflicting claimant was then before the Court. It was argued in that case, that the evidence ought to satisfy the Court that the wife died in the lifetime of her husband, on which event, he * 206 by his will gave all *his property to the present appellant.

On that question of fact the Master of Rolls first, and afterwards I, as Lord Chancellor, with the concurrence of two learned Judges, held, without hesitation, that Mr. Wing had failed to establish his proposition, that he had not proved that the wife died in her husband's lifetime. A similar question of fact arose in the present case. But it is needless to say more on the point. Your Lordships, I believe, all agree that there is no evidence warranting any conclusion as to whether the husband survived the wife, or the wife survived the husband.

Supposing this question of fact to be thus left in uncertainty, and to be incapable of solution, still it was contended before me, in the case of *Underwood* v. *Wing*, that Wing was entitled, under the husband's will, to the whole of his residuary personal estate, for that, according to the true construction of that will, every thing was given to him which from any cause the wife could not take. The wife, it was argued in that case, did not, and could not, take any thing; and that being so, and the children having all perished in infancy, the gift to the defendant, Mr. Wing, it was said, must, according to the authorities, be held to have taken effect.

That reasoning did not convince me. There is abundant authority to show that if a bequest is made to A. on one event, and failing that event, on another event to B., then, if the first event does not happen, the Court may understand the testator to have meant that B. should take, though the event on which the bequest is, in terms, made to him, is not the exact alternative of that on which it was given to A. It may, if the circumstances warrant it, be understood that the gift to B. was meant to take effect if, from any cause, the gift to A. did not take effect. This, as a rule of construction, is in some * 207 cases not unreasonable, *and has often been acted on. I may refer to the cases of *Jones* v. *Westcomb*, *Avelyn* v. *Ward*, *Hillersdon* v. *Lowe*, and *Warren* v. *Rudall*, and there are many others. But there is not, so far as I am aware, either principle or authority for saying that if there is a bequest to A., on a particular event, and failing that particular event, to B., that B. can take if

it cannot be ascertained whether the event has or has not happened. In such a state of circumstances, there is no more right in B. than in A. The husband here, by his will, said that if his wife died in his lifetime, Wing should take. In all probability he would also, if it had occurred to him, have said, "If it cannot be ascertained whether she dies in my lifetime or not, then also Wing shall take;" but that he has not said.

On this ground I decided against the claim of Mr. Wing, in *Underwood* v. *Wing*. It was uncertain in that case whether Mrs. Underwood did or did not die in the lifetime of her husband. If she did, Wing was entitled to his personal estate. If she did not, her personal representative was entitled to it. Mr. Underwood's next of kin were, of course, *primâ facie* entitled to his personal estate; and as Wing could not displace this title by showing that Mrs. Underwood died in his lifetime, I held with the Master of the Rolls, that there was nothing to displace the *primâ facie* title of the next of kin, represented by the plaintiff in that suit. It was, as I thought, a fallacy to assume that the bequest to Mrs. Underwood had failed to take effect. Undoubtedly it had failed so to take effect as to give to her any practical enjoyment of the property, for, if she was the survivor, she could not have survived for more than a few seconds; but her survivorship, if she did survive but for a second, was sufficient to displace the claim of Wing, and to entitle her personal representative to the whole personal estate of her husband. The inability * to ascertain the * 208 truth no more assisted the claim of Mr. Wing than that of Mrs. Underwood's personal representative. It was on these grounds that I decided, and, with all deference to those who differ from me, I think rightly decided, the case of *Underwood* and *Wing*.

In the present case, the question arises on the will, or rather testamentary appointment, executed by Mrs. Underwood. Under the will of her father, she had an absolute power of appointment over his residuary personal estate, and, in default of appointment, his personal estate was so given, that certain of the defendants in this suit would be entitled to it. In exercise of her power Mrs. Underwood appointed the whole to her husband, but if he should die in her lifetime, then to Wing. In this case, as in that of *Underwood* v. *Wing*, the counsel for Mr. Wing contended that the gift to him must be considered to have taken effect, because the alternative gift to the husband had failed. On the ground on

which my decision rested in the former case, I think that this argument must fail. There is no more reason on such an argument to exclude the claim of the husband's personal representatives, than to exclude the claim of Wing. If Wing contends that he is entitled, because it is not shown that Underwood survived, Underwood's representatives may with equal force contend that they are entitled, because it is not shown that he died in the lifetime of his wife, that is, that he did not survive. Acting, therefore, on the principle by which I was guided in the former case, I come to the conclusion that Wing has not established his claim.

In a case so peculiar as that of this shipwreck, the judgment is liable to be led astray, from its being certain that both the parents perished almost at the same point of time. But the same question might have arisen if the circumstances had been somewhat * 209 different, and if there * had been no such certainty. Suppose, for instance, that Mrs. Underwood had not sailed with her husband and children, but that they having sailed for Australia, she had remained in England and died there a few weeks after the ship had sailed, and that the ship and all on board had perished on the outward voyage, but that there were no means of ascertaining when, where, or how it perished: surely in such a state of circumstances, it could not have been contended that Wing had any title preferable to that of Mr. Underwood's personal representatives. I see nothing to distinguish such a case in principle from that now before your Lordships.

The contest in this case is not, as it was in the case of *Underwood* v. *Wing*, a contest between Wing and the next of kin of Underwood, but between him and those entitled to Tulley's personal estate in default of appointment. But this does not create any real distinction. In the latter case, as in the former, the question is whether Wing has shown a title displacing the right of those who have a *primâ facie* title; and whether that *primâ facie* title is one conferred by law, like that of next of kin, or one created by the parties, as under the will of Mrs. Underwood's father, can make no real difference.

I may remark, as well with reference to this case as to that of *Underwood* v. *Wing*, that the rule of construction relied on by the appellant might have been contended to be applicable if the fact had been, and had been ascertained to be, that Mr. and Mrs. Underwood both died at the same instant of time, if that could be possible.

In that case the gift to Mrs. Underwood, in *Underwood* v. *Wing*, would have failed, because she did not survive the testator her husband. The gift to Wing would not in terms have taken effect, because she did not die in the lifetime of her husband. But the fact being ascertained, that the contingency * did not * 210 happen on which the wife could take, it might have been argued (I do not say whether successfully or not) that the will ought to be construed as having intended to give to Wing that which the wife would have taken if she had survived; and so, by similar reasoning in this case, that Wing was entitled to what had been appointed to the husband. The facts, however, on which such an argument would have rested, would have been very different from those on which we are now called on to decide.

The two cases, so far as I have hitherto considered them, are not distinguishable in principle. It was, however, contended, that there is a distinction in this case, arising from the fact that here we have before us (which the Court had not in *Underwood* v. *Wing*) the person entitled in either alternative, the person entitled, if Mr. Underwood survived his wife, and the person entitled, if she died in his lifetime. Wing is the personal representative of Mr. Underwood, and in that character is entitled if he survived his wife. If he did not survive, then Wing is entitled in his own right.

I have considered this distinction, but I do not think that it warrants us in arriving at any different result. Suppose the fact had been that some third person had been Mr. Underwood's personal representative, it could not surely have been contended that though neither he nor Wing could separately have established a claim, yet that they might club their rights together and say that one or other of them was entitled. Lord Eldon, on the demurrer in *Cholmondeley* v. *Clinton*,[1] and Lord Redesdale in this House,[2] evidently considered such a course as inadmissible, and it is certainly contrary to all principle. Can it, then, make any difference that here the two rights are united in the same person? I think not. They are rights * of a totally different nature. In one * 211 view of the case Wing would take for his own sole benefit, whereas in the other he would take only to distribute according to Mr. Underwood's will, after paying his debts. The persons claiming in default of appointment are entitled to hold the property till

[1] Turner & R. 116. [2] 4 Bligh, 81.

some one can show an appointment in his favour. Wing cannot show an appointment to him personally. He cannot show an appointment to Underwood, alone, whom he represents. It cannot be that the mere character of executor gives any right to Wing, for then he would be entitled, even though the beneficial interest was all given to another. It cannot be that his right results from his being residuary legatee, for he might have filled that character though another had been executor. And if he could not, for the purposes of this suit, connect either of these rights separately with his personal claim as appointee, so neither can he rely on the union of both of them in his own person. Justice cannot be done by handing over the funds to him on the ground that he unites in himself both claims. It is impossible to know how he is to dispose of the property when he has got it. The persons entitled in default of appointment are to be treated as persons in possession, and they are not to be dispossessed unless by some one showing how and in what right he has a superior claim. The union of the two rights in Wing does not enable him to do this; if, indeed, the same person was entitled for his own benefit, whichever of the events had happened, this argument of the appellant would have been good. If, for instance, the appointment had been in one event to Wing, in the other to the person who at the death of the person appointing filled a particular office, say that of Lord Mayor of London, then if Wing was at that time Lord Mayor of London he would be entitled, *quacunque ria*, and his title would be good. But
* 212 then it would * be certain that in every possible event Wing must be entitled for his own use and benefit.

If it be said that, in the circumstances of this case, it certainly was not intended that those entitled in default of appointment should retain the property, I answer it was intended that they should retain it till some other person could show a valid appointment in his favour; and this is not shown. I do not, therefore, see any valid distinction arising from the accident that here Wing claims, not only in his own right, but also as executor and residuary legatee of Mrs. Underwood. They are two distinct and inconsistent rights incapable of being joined together. The result, therefore, is, that I think the decree below was right, and I must, therefore, recommend your Lordships to affirm it, though of course I cannot but feel, to some extent, diffident of my own opinion, opposed as it is to that of my noble and learned friend.

My Lords, I have this morning received a note from my noble and learned friend, Lord Brougham, who was obliged to quit England in the course of this morning, and he authorises me to say, that having done me the favour to look at what I had written, and also at the learned and elaborate judgment of the Lord Chancellor, he concurs in the view which I have had the honour to submit to your Lordships.

LORD WENSLEYDALE, after stating the two wills, the facts set forth in evidence, the suits and the proceedings in the Courts below, said: I think, after much consideration, that the view taken of the case by the Master of the Rolls, agreeing with that taken by Lord Cranworth in the other case of *Underwood* v. *Wing*, is right.

Three questions were discussed in the arguments before * us. First, whether the burthen of proof that he was en- * 213 titled, lay upon the appellant. This point was not much pressed, and there is not the least doubt that the appellant was bound to show that he had a right according to the true construction of the will under which he claimed. The *onus probandi* was clearly upon him. Secondly, it was contended that there was evidence of the death of the wife in the lifetime of her husband, so as to entitle the appellant, under the will of Mrs. Underwood, supposing that upon the true construction of that will it was necessary to prove that fact. The question is not whether there was evidence to go to a jury, if there had been an issue, and the question had been left to them whether the husband survived. The question for us is, whether, upon the written evidence on which the judges themselves are to decide, according to the present defective mode of trying disputed facts in Chancery, they ought to come to that conclusion. And considering that the Master of the Rolls, Lord Cranworth, and the Judges, Mr. Justice Wightman, and Mr. Baron Martin, are all of opinion that they ought not, I think we should accede to that opinion, unless convinced to the contrary. And I must say, that far from disagreeing with those learned persons, I think they have come to a perfectly just conclusion. The evidence leaves it in total uncertainty whether the husband died before or after the wife, or whether they both died at the same instant. Whoever has to maintain any one of these propositions, must certainly fail. And this disposes of the case, if

the clause in each will should be construed according to its strict grammatical construction. The appellant would be entitled, under Mrs. Underwood's will, only in the event that the husband died in the lifetime of the wife; and under Mr. Underwood's will *214 only if the wife * died in the lifetime of the husband; but under neither if they died at the same instant.

But then it is contended (and the argument was principally directed to that point), that according to the true construction of the two wills, the conditional limitations could be construed as taking effect, not merely in the events expressly mentioned respectively, but in the event of the husband and wife dying at the same moment. If there was simply a contract to give a sum of money to any one, on condition that A. died in the lifetime of B., I think it never could be held that the person to whom the promise was made, could recover, unless he proved that the precise event happened; and if he left it uncertain whether both did not die at the same moment of time, I think it perfectly clear that he would not succeed.

But it was contended that, in a conditional limitation in a will which may be supposed to be meant to dispose of the whole of the testator's property, the context would enable us to depart from the grammatical construction of the words, and to read them as intending to provide, not merely for the case of the legatee dying in the lifetime of the testatrix, but dying at the same time, as if the words had been "if the legatee shall not survive," or, in other words, "if the previous legacy shall lapse," then over. I was very much struck with that argument, and certainly was inclined for a time to think that the will of Mrs. Underwood (and that of Mr. Underwood is open to the same consideration) might be construed as providing for the lapse of the legacy to her husband, by his not surviving her. But, after much consideration, I think this construction ought not to be put upon it. This case (and there are many like it) is one in which the temptation from the supposed hardship of the case to swerve from the estab- *215 lished rules of * construction, is strong. No one can doubt as to the testatrix's "intention," in the loose sense of that word. No one can suppose that she really meant not to give the property to Wing, if her husband and herself should happen to die at the same moment. No one doubts, that, had she thought of such a possibility at the time she made her will, she would have

provided for it by express words. But it cannot be too often repeated, that the true question in all these cases is, not what the testatrix intended to do, but what is the meaning of the words used in the will. Sir James Wigram says, in his excellent work on the application of parol evidence,[1] "It is not what the testator meant, but what is the meaning of his words." Those ought to be construed according to the rule now fully established. The will is to be read in the ordinary and grammatical sense of the words, unless that is contrary to or inconsistent with the declared intention of the writer, to be extracted from the whole instrument, or unless it involves any absurdity; in which cases it may be modified, extended, or abridged, so as to avoid such inconvenience, but no farther.

This rule, in substance, has been laid down by Mr. Justice Burton, and before him, in the strongest terms, as a rule of the greatest importance, by Lord Ellenborough, and since by Lord Cranworth, by Mr. Justice Maule, and by Chief Justice Jervis, as will be found in the report of the case of *Abbott* v. *Middleton*.[2]

It is impossible to overrate the importance of steadily and faithfully adhering to this rule, for the sake of the great interests of society in avoiding litigation, and affording the best chance of obtaining as much certainty in the construction of wills as the subject is capable of. It is better, * as Mr Fearne * 216 says (page 173), that the intentions of twenty testators every week should fail of effect, than that the rules should be departed from upon which the security of titles, and the general enjoyment of property, so essentially depend. Adhering to this rule, I do not see how any different reading can be adopted in the will of Mrs. Underwood. The words themselves are perfectly plain and clear. If the words were read in their ordinary sense, there would be an intestacy in the possible event of the contemporaneous death of the testatrix and her husband. There is no inconsistency, or repugnance, or absurdity in so construing them. But I cannot think, that the mere circumstance of intestacy in the supposed event of contemporaneous death can alone be sufficient to alter the construction of the clear words of this clause. The more reasonable inference is that the testatrix omitted altogether to consider the supposed case of contemporaneous death, and that

[1] 4th ed. p. 8, § 9.

[2] 7 H. L. Cas. 68.

it is therefore unprovided for. And I do not think that the decision in the case of *Jones* v. *Westcomb*[1] before Lord Chancellor Harcourt, and many subsequent cases, referred to at your Lordships' Bar, and which have been commented upon by my noble and learned friend on the Woolsack, where from the words used the Court has seen that the intention was that the limitation over was to take effect on failure of the precedent estate, are any authority for altering the express words of condition on which the limitation over depends. In the case of bequest to a supposed child *in ventre sa mère*, and there is no child, the gift fails from the want of a person to take it, and the gift over takes effect; if there had been a child the gift over would not have taken effect unless the precedent condition of that child dying under twenty-one had taken place. The concition does not really exist till after
* 217 the * child is born. A similar reason applies to other cases of posthumous children. It applies to *Avelyn* v. *Ward*, where the gift of the first estate failed by the death of the devisee in the testator's lifetime. And so in the case of *Warren* v. *Rudall*[2] before Vice-Chancellor Wood, where the first limitation failed because it was void in law.

To other cases the mode of reasoning adopted by Sir William Grant in *Murray* v. *Jones*[3] applies. He there points out that words at first sight conditional are really not so; as a gift "in case I have only one child," does not necessarily mean that the having one child was a condition precedent. None of those cases so understood applies to the present, where the words used are expressly conditional and perfectly clear and unambiguous.

All that can be truly said in this case is, that it is singular that the testatrix should have made the limitation over depend upon that precise event. The words used, however, imply no more; and though we cannot but conjecture that the testatrix might have intended to provide for every case of lapse by death, she certainly has not done so. I am quite satisfied, therefore, that the proposed construction cannot be adopted consistently with the preservation of the established rules of law.

But supposing the construction suggested should be adopted, and the will read as if it had provided for the gift over "in case the husband should not survive," or "in case the legacy to him

[1] Prec. in Ch. 316; 1 Eq. Cas. Abr. 245, pl. 10.
[2] 4 Kay & J. 603. [3] 2 Ves. & B. 313.

should lapse," it would not in my mind remove the difficulty. In the case of the claim under Mrs. Underwood's will, the appellant could not prove that Mr. Underwood did not survive, and that there was a lapse. In the claim as executor of Mr. Underwood, he could not prove that the wife did not survive, and that * there was a lapse. And therefore, in each character he * 218 would fail.

The circumstance of the family all perishing in the same shipwreck is only one case in which such difficulties would arise. . If the husband had gone abroad, and not been heard of for seven years; if the wife had done so, and not been heard of for the like time, or had died at a known time at home, just the same difficulty would have occurred. If either had died at a certain time, and the other at a time not known, it would have been equally impossible to ascertain whether either or which gift over had taken effect.

In this case it is contended that the difficulty is removed by the circumstance that the claimant under both wills is the same person. I think not. If the representative of Mr. Underwood were a different person from Wing, one of the two would be entitled without doubt, for Mr. and Mrs. Underwood must have died one before the other; or both must have died simultaneously. It might therefore be contended that Mrs. Underwood's will must have been an effective execution of the power, as one or the other must have taken under her will, and the legatees over could not take. But I apprehend it to be clear that this would not have been sufficient to defeat the title of the legatees over. To do that it would be necessary to show not merely that one or the other, but which of the two was entitled to take the property appointed. The Court must be able to say to whom it is bound to give the property as legatee, in priority to the legatees over. Both such claimants could not defeat the title of the ultimate legatees by joining their claims together, each claiming under a different right. The case of *Cholmondeley* v. *Clinton*[1] shows very clearly * that * 219 Lord Eldon thought that two persons, each asserting the title to be in him, could not join in one suit for the property. He says, "it is a record quite singular, and quite different from any I ever recollect, that two persons can come into this Court,

[1] Turner & R. 107.

and say the title is either in me or you, each contending it is in himself, and bring before the Court a defendant." And this is quite analogous to proceedings at law. If an action for a legacy could be maintained, and one was brought for a legacy, subject to the like condition, both could not join in the same action. Each must have brought his own action. And under the circumstances of this case, neither being able to prove his right, both must fail.

But does the circumstance that in the present case the appellant happens to fill both characters, make a difference? He claims, as legatee of Mrs. Underwood, if she survived; as executor of Mr. Underwood, and legatee, if he survived. In one case he would take the property absolutely, in the other in his representative character, subject to the debts of Mr. Underwood. Must he not make out his claim to the fund in Court in one character or the other, and distinctly show in which he was entitled? Is it not substantially a claim by Wing and by the creditors of Mr. Underwood and his legatee whom the executor represents? Before the probate was obtained the claim was by two sets of claimants. By the fact of obtaining probate subsequently, is the claim made a single one?

If we pursue the analogy before mentioned, and suppose that a legatee could maintain an action for a legacy, undoubtedly he would, in that case, have to bring two different actions, one in his own right as legatee and another as executor to Underwood, and to show his title in both those actions according to the nature of the action. I should think that he would be compelled to
* 220 show distinctly in * this proceeding in which character he claimed the fund in Court, which the Court is called upon to distribute by its decree. This he could not possibly do, as the evidence leaves the claim in either character in total uncertainty. But, after considerable inquiry, I do not find any authority upon this precise point either way; I cannot, therefore, entirely rely upon this view of the case, but I am very strongly inclined to think that it is perfectly correct. But, on the first ground stated, that the strict grammatical construction of the conditional limitation cannot be departed from, I think the decree ought to be affirmed. And, on the latter ground, also, I strongly incline to think that it ought to be affirmed.

LORD CHELMSFORD. — My Lords, I agree in the opinion which

has been expressed by my two noble and learned friends who last addressed your Lordships' House, and which is concurred in by my noble and learned friend Lord Brougham. With respect to the question upon the fact of survivorship when two persons are swept away together by a calamity like that which happened in this case, it is possible that there may be evidence to prove distinctly which was the survivor, as where one of them has been seen struggling with the waves after the other has sunk, and never again appeared above the surface, or as in this very case, where there can be no doubt that there is evidence to establish satisfactorily that Catherine, the eldest daughter, survived her parents for some short time, though she afterwards perished in the same shipwreck. But where two persons are at one and the same instant washed into the sea and disappear together, and are never seen any more, it is not possible for any tribunal called upon judicially to determine the question of survivorship, to form any judgment upon * the subject which can be founded upon any thing but mere * 221 conjecture, derived from the age, sex, constitution, or strength of body or mind of each individual; and as our law has not established any rules of presumption for these rare and extraordinary occasions, the uncertainty in which they are involved leaves no greater weight on one side or the other to incline the balance of evidence either way. If, therefore, it is necessary that the appellant, to establish his claim under the will of Mrs. Underwood, should prove that she survived her husband, he must altogether fail.

Now, whether this proof is essential, must be gathered from the intention of Mrs. Underwood, as expressed in her will. Did she intend that the appellant should have the property in any event by which her husband might become incapable of enjoying it; or did she mean to impose it as a condition of the gift to him that her husband should die in her lifetime? There seems to be little difficulty in replying to these questions, that she probably intended Mr. Wing to take, upon the failure, in any manner, of the bequest to her husband; but that, not contemplating any state of circumstances in which that bequest would become inoperative, except by his dying in her lifetime, she used that form of expression to indicate that Mr. Wing was, in that event, to be substituted for her husband. Had it occurred to her mind that a highly improbable state of facts might arise, either of their both perishing together,

or of its being impossible to ascertain which was the survivor, no doubt she would have used apt words to embrace such an extraordinary contingency. Can the language which she has employed be made to include such an intention? If it cannot, then we are not at liberty to go out of the will to bring into it something which is not to be found there. The testatrix says, I give to my husband certain property, and in case he should die in my lifetime, * 222 then to the * appellant. She clearly intended that the appellant should not have her property if her husband survived her, for on that event it was to go to him. The appellant can only be entitled in case the husband fails to take by survivorship. If the husband survived, the appellant's bequest never came into existence. But he cannot show that the husband did not survive, and therefore he fails altogether in establishing the foundation upon which alone his right can be built.

This is one of those cases in which a strong temptation is presented to the Judge to strain the construction in order to reach a presumable and probable intention. The appellant was no doubt intended by both husband and wife to take the property in the event, in either case, of the one not surviving the other. And if both of them had been asked what should become of the property in the event of their simultaneous death, or a total inability to establish the survivorship of either, it may be taken for granted that their answers would have been in favour of the appellant. But the stronger the wish to give to the appellant what he has been deprived of merely by an accident, the more ought the judgment to be guarded against the danger of forcing a construction upon the will, in order to prevent a conjectural intention from being defeated.

None of the decisions which were cited in the course of the argument meets the present case, nor does any one of them determine that where a gift is made to A. on a given event, and failing that went to B., and the gift to A. "is out of the case" (to use Lord Hardwicke's expression in *Avelyn* v. *Ward*) on account of the inability to show that the event has occurred, the gift to B. shall take effect.

But it is said that the right of the appellant, under the present will, has been judicially determined in his favour by the * 223 decision in the case of *Underwood* v. *Wing*, upon the * will of Mr. Underwood. Upon this it is to be observed that if it can be collected from the will in question, that it was intended

that the appellant should take, however the preceding gift failed, the bequest to him does not require any foreign aid, either by judicial decision or extrinsic evidence. But if, as I have already stated my opinion to be, the only intention indicated by the will is, that the gift to the appellant was to be dependent upon the husband's dying in his wife's lifetime, then the decision in *Underwood* v. *Wing* cannot help him, because it did not proceed upon the ground that there was proof that Mr. Underwood did not survive his wife, but that there was no evidence to show which of them was the survivor.

It has been proposed also, to place the wills of Mr. and Mrs. Underwood together, and to contend that, as under the two Mr. Wing would have been entitled, whichever of them was the survivor, therefore it is immaterial to the decision of this case whether he proves that Mrs. Underwood survived her husband or not. But it is difficult to understand upon what principle the wills of Mr. and Mrs. Underwood can be taken together for the purpose of interpretation. If different persons had been entitled under the two wills, each must have established his claim solely by the will in his favour, independently of the other, and no difference can be made in the rules of evidence, because the appellant accidentally happens to be the ultimate legatee in both wills.

In forming my judgment upon this case, I have had to struggle with my strong inclination so to construe the will as to give the appellant the benefit under it, of which he has been deprived by a singular and unforeseen accident. I would gladly have found any thing which either expressly or by necessary implication manifested an intention that he should take at all events upon the failure of the gift to * Mr. Underwood. But it must * 224 be conceded, that the event which happened was so extraordinary and improbable, that it was not likely to have occurred to the mind of any one, and therefore no provision for it could have been contemplated. We may, indeed, speculate with great probability, if not with certainty, as to what the form of the bequest would have been, if the possibility of such an event had been suggested; but to act upon such a speculation would be to make the will speak a different language for the purpose of satisfying an intention which could not have been conceived, and, therefore, could never have been meant to be expressed. It is with very great reluctance that I feel myself compelled to differ with the judgment of my noble

and learned friend the Lord Chancellor, and to arrive at the conclusion that the decree ought to be affirmed.

Mr. Roundell Palmer. — Perhaps before your Lordship puts the question to the House, you will permit me to say a few words with respect to the costs. This being a case which has arisen upon the construction of a will, and under circumstances of such a peculiar character, and there being a difference of opinion among your Lordships, I trust your Lordships will not think it improper that the costs should be paid out of the estate.

LORD CRANWORTH. — I think it is quite right that there should be no costs; but to say that the costs should be paid out of the estate would be, in fact, saying, that the winning party should pay the costs. I do not think that is right.

LORD CHANCELLOR. — What is your Lordships' pleasure with respect to costs?

LORD CRANWORTH. — I think it should be without costs.

Decree affirmed, and appeal dismissed without costs.

Lords' Journals, 29 February, 1860.

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* 225 * RANDFIELD *v.* RANDFIELD AND OTHERS.

1860. Feb. 28, 29. March 8.

HARRIET REEVE RANDFIELD, *Appellant.*
RICHARD RANDFIELD and Others, *Respondents.*

Wills Act. Date of Will. Witnesses. Legatees. Dying without issue. Contingency gone. Residue. Real and Personal Estate.

IN applying the rule that a clear gift in a will is not to be cut down by any subsequent provision, unless the latter is equally clear, the plain intention of the testator, and not the comparative lucidity of the two parts of the will, is to be regarded.

Where a testator prepared a will in 1837 (before the Wills Act) but did not execute it till 1844, and in the meantime one contingency mentioned in the prepared will had gone, the words in the will when executed were construed without reference to that contingency.

A testator devised all his freehold and copyhold estates to his son "when he have obtained the age of twenty-one years, upon the following conditions," and directed that his own widow should receive an annuity out of these rents; he then gave to his son all his personal estates, consisting of ships, bonds, and funded stock, &c., "but should the hand of death fall on my widow and son, and my having no other children, or my son any issue, my will is then that should he leave a widow, she shall receive an annuity out of my real estates as before mentioned, the residue then to be equally divided, share and share alike, after paying such legacies as I may hereafter name, the division to be" between certain persons specifically mentioned, "(they paying all my son's debts, funeral expenses and demands, or my wife's should she be the longest liver.)" The son became twenty-one some years before the will was executed; he married, but died without ever having had issue: —

Held, varying the decree of the Court below, that the gift over affected only the real estate.

Held, also, that the will must be read as if made in 1844. That the contingency of attaining twenty-one was to be disregarded, and that the gift over took effect on the son dying without issue.

A will was executed in 1844. It had the name of the testator, his seal, the word "witness," and then the names of two persons, J. T. G. and J. S. H. These names were the last marks on the third side of the sheet of paper on which the will was written. On the top of the fourth side were the words "This last will and testament was signed in our presence, and in the presence * of each other, by him, J. T. G., J. S. H., G. B." This last name * 226 was that of a person named as a legatee in the will: *Held*, that this was not such an attestation of the will as to deprive G. B. of her right to the legacy.

WILLIAM RANDFIELD, late of Harwich, ship-owner, made a will, which was dated 18th October, 1837, but was not executed until the 14th February, 1844. By this will he devised all freehold and copyhold estates in the county of Essex (which he specifically enumerated) "to my son, William Cass Randfield, after my decease, and when he have obtained the age of twenty-one years, upon the following conditions being complied with, agreeable to this my will: that my widow, Ann Randfield, his mother, shall receive annually the sum of 120*l.*, issuing out of the rents of all my houses, farms, &c.," for life in widowhood, with a house to live in, rent free, and with all the requisite furniture, &c., to be selected by her from the testator's furniture, for her use during her life. "I then give and devise to my son, William Cass Randfield, all my personal estates whatsoever and wheresoever, and all my vessels, coasting vessels, parts and shares of vessels, securities for money, mortgages, bonds, notes, with all funded property standing in the name of William Randfield in the books of the Governor

and Company of the Bank of England, and also of my private bankers, with all my stock in trade, residue of household furniture, plate, linen, goods, chattels, and all my effects of whatever nature, kind, or description, at the time of my decease; but should the hand of death fall on my widow, Ann Randfield, and son, W. Cass Randfield, and my having no other children, or my son any issue lawfully begotten, my will is then, that, should he leave a widow, that she shall receive the annual sum of 50*l.* during * 227 * her widowhood out of my real estates before mentioned; the residue then to be equally divided, share and share alike, after paying such legacies as I may hereafter name, the division of property to be between, &c. (they paying all my just debts, funeral expenses, and demands, or my wife's, should she be the longest liver)."

The will was written on three sides of a sheet of paper; the testator and also two persons, named Groom and Harris, signed their names at the bottom of the first and second sides; at the bottom of the third side were the following words and names, "witness my hand and seal, W. Randfield (L.S.). (Witness) John T. Groom, James S. Harris."

On the fourth side was written the following memorandum, without any other writing, above it or below it, on that side of the sheet: "This will and testament was signed in our presence, and in the presence of each other by him. Witness thereto, John T. Groom, James S. Harris, Grace Beeston." This Grace Beeston was a niece of the testator, and was one of the residuary legatees specifically named in the will.

The testator died 29th February, 1844, leaving his wife and son him surviving. The son had attained the age of twenty-one in 1839, about two years after the date of the making of the will, and about five years before its execution. On the death of his father, he entered into possession of all the property, and paid the annuity to his mother. He died in 1856, leaving Harriet Reeve Randfield (the appellant) his widow, and also his mother him surviving. He never had any issue. He had made a will on the 3d February, 1855, leaving all his real and personal estate to his widow, whom he appointed his sole executrix. She filed a bill, stating all the facts, and among them that "Grace Beeston, the niece of the testator, in his will named was an attesting * 228 * witness of the execution of his said will. She neverthe-

less claims an interest in the said testator's estate." The bill prayed that the will of W. Randfield might be established, and the rights and interests of all parties ascertained and declared, &c. The residuary legatees in that will were the defendants; they put in their answers. In the answer of Grace Beeston, it was alleged that the testator executed his will in the presence of, and that the same was attested by, Groom and Harris, "and that after the will was so executed and attested," the memorandum was written and signed. Evidence was gone into on both sides, and the cause came on to be heard before Vice-Chancellor Kindersley, who, on the 25th July, 1857, made a decree, by which it was declared that W. Cass Randfield, on his attaining twenty-one, became entitled absolutely to the real and personal estate of the testator, subject to the annuity of 120*l.*[1] The defendants appealed, and Lord Chancellor Cranworth ordered the decree to be varied, and declared that, according to the true construction of the will of William Randfield, on the death of W. Cass Randfield, without ever having had issue, the residuary legatees who were living at the testator's death became entitled to all the testator's real and personal estate, subject only to the annuities of 120*l.* and of 50*l.*, and to the occupation of the house by Ann Randfield during her life.[2] Several inquiries were directed; the first of which was, "what were the circumstances attending the signature to the memorandum," "and particularly whether it was signed by them in the testator's presence, and at his request."[3]

[1] 4 Drewry, 147. [2] 2 De G. & J. 57.

[3] No point in argument or judgment is made in either of the reports as to the effect of Grace Beeston's signature to the will, but when the case was brought before this House attention was called to a short-handwriter's note of the judgment of Lord Chancellor Cranworth, in which that matter was thus noticed: —

"The suggestion is, that Grace Beeston cannot take, by reason of her being an attesting witness to the will. Now, on that question, whether Grace Beeston has lost her share in the property by reason of her having signed the memorandum which is indorsed on the last sheet of the will, I do not think there are facts enough to enable me to come to a conclusion. The state of the case is this: The will is upon three sheets of paper. To each of those sheets there is the signature of the testator and of two witnesses, Groom and Harris, indifferent persons. The last sheet has the two names written under one another. 'Witness my hand and seal, William Randfield,' the testator, and then, on the other side of the paper is, 'Witness, J. P. Groom, Jas. Harris.' Now there can be no doubt, if there were nothing more, that that was a perfectly executed will. Upon that there cannot be the least doubt, supposing the witnesses deposed, and that is

* 229 * *Mr. Baily* and *Mr. Shebbeare* for the appellant. — First, the personal estate vested absolutely in the son, and, sec-
* 230 ondly, as to that there is no divesting clause. There * is such a clause as to the real estate, but it does not apply here. There is a third point, as to the interest of Grace Beeston, but that will not arise if the appellant succeeds in the others.

It must now be taken as a settled rule that where there is a clear gift, it cannot be cut down except by words equally plain and clear, *Home* v. *Pillans*,[1] *Doe* d. *Hearle* v. *Hicks*,[2] *Abbott* v. *Middleton*.[3] The words as to the personal estate are perfectly plain, and vest an absolute indefeasible interest in the son; and the nature of the properties, all of which would perish by use, leaves no doubt that such must have been the intention of the testator.

legitimate evidence for the proper Court, — the Court of Probate as to the personal estate, and the Court of Common Law and this Court as to the real estate, — that the testator did, in fact, sign in the presence of these two witnesses; and that being both present together at his request, and in his presence signed their names, there is an end of the case, there was a perfectly valid will. The difficulty arises from this, that on the back there is written 'this last will and testament,' there is no testimonium clause, as it is called, but simply the word 'witness,' and on the back there is, 'This last will and testament was signed in our presence, and in presence of each other by him, witness thereto, J. T. Groom, J. S. Harris,' those are the former witnesses, and then 'Grace Beeston,' who was one of the devisees. The question is, whether that is an attestation by her to the will, so as to make, under the provisions of the last Will Act, the legacy and devise to her void. If she and the other two witnesses signed that memorandum after they had seen the testator sign the will, and did so at his request and in his presence, then I think they were to all intents and purposes all three witnesses to the will. There is no place so specially indicated by the statute as being the part of the paper at which the witnesses ought to sign, and the Court of Queen's Bench has recently decided (*Roberts* v. *Phillips*, 4 Ellis & B. 450) that the word 'subscribe' in the Statute of Frauds does not mean, according to its literal derivation, 'sign under,' but that the signature of the witness may be on any part of the paper, if written with the intent of authenticating the document. That decision is clearly applicable to the language of the modern statute, but if the memorandum was signed by the three persons who signed it, not at the request of the testator, but only for their own satisfaction, and in order to preserve a record of what did not in terms appear on the face of the will, there being no testimonium clause, then they were not persons attesting the execution of the will within the meaning of the 15th section of the 1 Vict. c. 26, and the gift to Grace Beeston in such case is not affected. The test would be this: if that were the state of things she would not be a competent attesting witness to prove the execution of the will, provided the other two witnesses were alive."

[1] 2 Mylne & K. 15. [2] 1 Clark & F. 20. [3] 7 H. L. Cas. 68.

The word "but" is disjunctive and adversative; it opposes one case to another, *Webster* v. *Hale*,[1] and its effect in this will is entirely to separate the personal estate from the provision as to going over, and to leave the preceding part of the will completely unaffected by that provision.

The words of the gift over direct the "residue" to be divided. What residue? not the residue of all his property. The testator had just before been speaking of his real estate, and the "residue" must refer to that. That alone could be affected by the gift over, but under the * terms of this will and the events that * 231 have happened, the real estate is not so affected. The gift of the real estate must, it is admitted, be construed with reference to a contingency, the contingency of the son attaining twenty-one, but with reference to that alone; it is true that the testator executed the will after that event had ceased to be contingent, but he did not thereby show that he intended any other contingency to affect the gift; he left the date standing, and so the will is to be construed as things stood when it was made; what the testator treated as contingent when he made the will must be treated as so continuing when he executed it. It is the same as if the will had been absolutely executed before the son attained twenty-one, and had merely been confirmed afterwards. The provision in the Wills Act, that the will is to be construed as if made immediately before the testator's death, relates only to the property comprised in the will, but not to the objects of the testator's bounty. *Bullock* v. *Bennett*.[2] The son, therefore, on attaining twenty-one, took absolutely, subject only to the interests specially created by the will, which were those of the two annuitants. It is highly improbable that the testator could mean to give the estate as he does give it absolutely to his son upon his attaining twenty-one, and then take it away again after the son had attained that age. The contingencies of death and of leaving children were mentioned in the case of *Home* v. *Pillans*, as they are mentioned here, but nevertheless the interest was held to vest absolutely in the legatee on her attaining twenty-one. That case must govern the present. *Edwards* v. *Edwards*[3] also very much resembles it. There the gift was to A. during widowhood, and to B. as in this case, absolutely; there was then a gift over if B. should die leaving

[1] 8 Ves. 410. [2] 7 De G., M. & G. 283. [3] 15 Beav. 357.

* 232 no children. B. survived A., and it was held that * he took an absolute vested interest, not liable to be divested on his subsequent death without children; and so the gift over on that event failed. The Master of the Rolls said:[1] "There are four classes of cases in which questions of this description arise. The first is that of a gift to A., and if he shall die, then to B.; the second, that of a gift to A., and if he shall die leaving a child, then to B.; third, a gift to one for life, and after his decease to A., and if A. shall die, then to B.; fourth, a gift to one for life, and after his decease to A., and if A. shall die without leaving a child, then to B." The first contingency he held to have reference to the death of the testator; if A. survived him the gift was absolute and could not be divested; in the second it had reference to the death at any time of A. without children; in the third and fourth to the death of the tenant for life, and when that had occurred, and on it the estate had vested, it could not be divested. Whether the vesting of the estate was fixed by reference to a preceding period, or by an event which was to take place, is immaterial; the moment that the estate vested it was absolute, and could not be divested.

[THE LORD CHANCELLOR.—There is nothing, here, as to the interest of Grace Beeston, to prevent her from receiving her share, if the gift over takes effect.]

[LORD CRANWORTH.—The memorandum is not a regular attesting clause; it does not express that it was signed by them in the presence of each other, in the presence of the testator, and at his request. For any thing that appears to the contrary, it was a memorandum made only for their own satisfaction.]

Mr. Glasse and *Mr. Dickinson.*—The contingency of attaining twenty-one is not that on which the vesting of the estate was * 233 to become absolute, for * the son had attained that age some years before the execution of the will and the death of the testator. The testator could not, therefore, have contemplated that as a contingency. The words occurring after the word *but* are not to be disregarded. If they are struck out there is no provision for the son's widow. They show that the testator did contemplate the dying without issue, as a contingency on which the estate was

[1] 15 Beav. 361.

to go over, for he supposes his son to have married and to have incurred debts, and directs them to be paid by the residuary legatees. These debts could not have been incurred while the son was under age.

[LORD WENSLEYDALE. — Yes; he might have incurred debts under the name of "necessaries" supplied to him while under age.]

Such debts were not in the contemplation of the testator. The son's wife was, like the testator's wife, to be provided with an annuity; but subject to these two annuities to the two widows, all that the son could take was meant to go over. It is not because some of the personal property would perish from being used, and because the son was to use it for his life, and it must therefore of necessity vest absolutely in him, that therefore all the personal property vested absolutely in him. The true construction is, that only that part absolutely and indefeasibly vested which did so of necessity. That is shown by the direction to pay legacies; they must come out of the personal and not out of the real estate, and therefore all that the son took which did not of necessity perish in the use would go over. The gift over relates to both kinds of property.

[The LORD CHANCELLOR to *Mr. Baily.*—You do not urge that the will is void for uncertainty? *Mr. Baily.* — The meaning the appellant contends for is that which ought to be given to it. If that meaning cannot be applied to it, then it is void for uncertainty.] The only uncertainty * in the will is, whether * 234 the gift over applies to both properties. Even in 1837 the testator did not mean that the words under twenty-one should be imported into the gift over of the real estate. The gift over must be considered as a remainder on, or as a substitution for, the previous gift, if that previous gift cannot take effect, or as divesting the previous gift on a contingency taking place. That contingency is the dying without issue. If there is a gift to A., and on the death of A. to B., then on the death of A., an event which must happen, the gift over would take effect as a remainder. If there is a gift to A., at twenty-one, and he does die under twenty-one, then the gift over takes effect as in substitution. But there is a third class, which is that of the present case. Where an estate is given in terms absolutely, whether the gift is to take effect immediately on the death of the testator or on the legatee attaining twenty-one, then, on the happening of either event, the legatee will

take a positive and absolute interest. But that interest is by a subsequent provision in the will to be divested, and the question in the present case is, whether it is to be divested at the death of the legatee, or at any other period. Here it is to be divested on the dying without issue. There is nothing in this will to show that the legacies were to be exclusively payable out of real estate. The word "but" has here no such effect as is contended for on the other side. The legacies are, in fact, payable out of the general estate, and so the gift over, which is of the residue, applies to the whole estate which has been previously given to his son.

Mr. Baily replied.

March 8.

THE LORD CHANCELLOR (LORD CAMPBELL). — My Lords, in considering this case it will be convenient to keep separate
* 235 and distinct the questions which * arise with respect to the testator's real and his personal estates.

With respect to the real estate, I am of opinion that the decree appealed against ought to be affirmed. The *ratio decidendi*, upon which it is said that the Vice-Chancellor held that no operation is to be given to the limitation over on the death of the son without issue,[1] "If you have a clear gift it shall not be cut down by any thing subsequent, unless it is equally clear," appears to me to be insufficient. If there be a clear gift, it is not to be cut down by any thing subsequent which does not with reasonable certainty indicate the intention of the testator to cut it down; but the maxim cannot mean that you are to institute a comparison between the two clauses as to lucidity. In the present will the classes in whose favor there is the limitation over are clearly specified. There may be considerable doubt as to some of the conditions, but there is by no means such obscurity as to justify the holding that the latter part of the will is to be taken *pro non scripto*.

Mr. Baily, in his very able argument, placed little reliance on this objection, but powerfully contended that as the limitation on the face of the will was "to my son after my decease, and when he shall have attained the age of twenty-one years," followed by another contingency, "should the hand of death, &c.," then over, that the son, having reached twenty-one, at that moment took an

[1] 4 Drewry, 150.

absolute estate in fee simple. *Home* v. *Pillans* and *Edwards* v. *Edwards* were cited, of course. But this reasoning was founded upon the supposition that this will speaks from the date, October 18th, 1837, and as if it had been executed on that day when the testator's son was an infant, whereas it was not executed till February 14th, 1844, a few days before * the testator's * 236 death, and some years after his son was of age. This was of course well known to the testator, who must have intended that the first contingency, that of the son reaching twenty-one, should be disregarded. When the testator executed the will he could not by possibility have intended that the limitation over, which he then read, should take effect only on his son dying without issue under twenty-one. There can be no doubt as to the intention of the testator that the limitation over on his son dying without issue should take effect, and I see no rule of law to defeat that intention. Considering that his son had long been of age when the will was executed, the contingency of the estate not vesting in him was gone, and the effect is the same as if the devise had been "to my son William," *simpliciter*, "but if he should die leaving no issue," then to the respondents; in which case no question could have arisen as to the correctness of Lord Chancellor Cranworth's decision, so far as regards the real estate.

It therefore seems to me to be unnecessary to seek for other distinctions between this case and the cases relied upon by the appellant.

But now arises the question whether the Lord Chancellor was right in also declaring that all the testator's personal estate went with the real estate in the same line of devolution. It is to be borne in mind that the devise to the son of the realty, and the bequest to him of the personalty, are kept entirely separate and distinct, and that although some of the items of the personalty enumerated might well be made the subject of a gift for life with remainder over, most of them are such as could not be advantageously enjoyed by any one not entitled to the absolute property in them. When the testator comes to the limitation over on the son's death without issue, the first provision is in these words: "should he leave a widow, my will is that she * shall re- * 237 ceive the annual sum of 50*l.* during her widowhood *out of my real estates;* the *residue* then to be equally divided, share and share alike, after paying such legacies as I may hereafter name; the division of property to be between," &c. &c. The 50*l.* were

to be paid out of his *real estates*, and must be considered a part of his real estates; he then disposes of the "residue." The residue of what? Of his *real estates*. There are no other words to carry the personalty. And there is no subsequent disposition of his property that is not consistent with the supposition that the absolute gift of the personalty to the son remained untouched.

I am therefore of opinion that the decree of the Lord Chancellor should be varied by declaring that the son took the personalty absolutely, and by confining to the realty the operation of the gift over on the son dying without having had issue.

LORD WENSLEYDALE. — My Lords, I agree in the view which has been taken of this case by my noble and learned friend, the Lord Chancellor.

I agree entirely in Lord Cranworth's notion with respect to the real estate. As to the personalty I have had considerable doubt, but I think, on the whole, the more probable construction is that which has been put upon the will by my noble and learned friend on the Woolsack. There is an absolute gift of the personalty to William Cass Randfield, and it is personalty of a description not likely to be given for limited interests: ships and vessels, stock in trade, household furniture, linen, and all other goods, which includes such as are insurable and perishable by the ordinary use of them. There is no provision for the custody or manage-
* 238 ment of this personal estate by trustees, * which would be likely, if there had been an intention to give only a partial or defeasible interest to the legatee. The gift being in terms absolute cannot be cut down, unless there is a sufficiently clear indication of an interest to defeat it by the subsequent clause. I quite agree with the Lord Chancellor in the construction of those words to which he referred, that you need not have a clause equally clear, but it must be reasonably clear, and the clause to which that effect is attributed by the respondents is capable of a construction confining its effect to the real estates only. It provides in the events stated that the widow shall receive annually 50*l.* out of the *real estates*, the residue to be then equally divided; and the residue may reasonably mean the residue of the real estates, after paying the 50*l.* Taking into consideration the nature of the personalty, the impracticability of making it the subject of a settlement, and the terms of the bequest over, I agree with my

noble and learned friend that the personalty did not pass the respondents.

But with respect to the realty, if the will is to be taken, notwithstanding the date on the face of it, to speak as of the time of execution, it is clear that it could not mean that the devise over was to take effect only if William Cass Randfield died under twenty-one, or at any future time, without children, if the testator had no other child; for he had already attained twenty-one, and the testator must have known it. A singular circumstance, however, occurs in this case, that the will was prepared and bears on the face of it the date of October, 1837, before the new Will Act had come into operation; and was not executed till near seven years afterwards, namely, in 1844. A question then of some nicety might arise, whether this will ought not to be read with reference to that date, as if the testator had said in October, 1837, my wish was to leave my estate * on the terms * 239 herein expressed: I now by my execution of this instrument mean it to have legal effect. It is not necessary, however, to decide that question. If the construction could be put on it, and it could operate as of the time when it is dated, viz., October, 1837, the Wills Act not being in force, then the effect would be to give his son William Cass nothing more than a life estate in the realty, as the bequest would not in 1837 have passed a fee, and the bequest over would take effect as a remainder, and the ultimate legatees would be entitled.

I think, in any view of the case, as to the real estates, the decree of Lord Cranworth is perfectly right, and it must be varied only by confining it to the realty; as to the residue, I think the decree should be reversed.

Lord Kingsdown.—If the testator in this case had executed his will at the time at which he prepared and dated it, October, 1837, it appears to me that none of the questions now raised at the bar could have arisen.

At that time the Wills Act had not come into operation. All wills made before the 1st January, 1838, are expressly excluded from its operation. The will, therefore, would have been interpreted according to the rules of construction which then prevailed, and the testator's son being, at the date of the will, under twenty-one, the construction would have been reasonably clear.

As regards the real estate, the first devise to the son would have given him an estate for life at twenty-one, and the subsequent words would either have enlarged that interest to an estate tail, with remainder to the nephews and nieces, or would have contained a contingent remainder to the nephews and nieces, to take effect if the son died without ever having had any issue. * 240 In either construction there would have been * no previous estate in fee to be cut down by a subsequent executory devise. The gift of the personal estate to the son was absolute, without any contingency, and no question could have arisen with respect to it.

When the will was actually executed in 1844, the son had long attained twenty-one, and the Legislature had declared, that the words which the testator had used originally to give, and which would have given only a life estate, should give a fee; that the words which he had used with respect to issue should not mean an indefinite failure of issue, and should not create, therefore, an estate tail.

In what sense, then, are we to read the testator's will? I apprehend we must understand him as declaring, "This instrument, in the new sense given to the words by the Legislature, contains my intentions, and those I mean to be carried out as far as the altered circumstances of my family will allow."

If this be so, the testator, knowing that his son had attained twenty-one, must have considered, of course, that the gift which had been previously contingent on that event could no longer be subject to that contingency, and that what he had previously meant to be a life estate should be an estate in fee. But there was one of the contingencies contemplated by the will which was still capable of taking effect, viz., the event of the son having no issue; and the gift over on that event, though it could not take effect as a remainder, might well take effect as an executory devise. Although, therefore, I think the rule laid down in *Home* v. *Pillans*, and approved of by the Master of the Rolls in *Edwards* v. *Edwards*, is a perfectly sound one, and that it ought not to be disturbed, yet it cannot apply to the present case. If there had been two contingencies to which the words might have been * 241 * applicable, they would, I think, have been properly applied to the first, the dying under twenty-one; but that contingency did not exist when the will was executed, and they can be applicable, therefore, only to the other.

I think, therefore, the judgment is right as regards the real estate.

But I confess it seems to me that the gift over is confined to the real estate. There is a marked distinction between the disposition of the real and of the personal estate, even under its new interpretation, though not so strong as there was at the time the will was prepared. The language used in strictness applies only to the realty, and the improbability I think is great, having regard to the enumeration of the articles of which the personal estate consisted, that the testator should intend to make it the subject of a gift over, and that during the whole period of his life his son should be left in doubt whether he was to be absolute owner of it or not. The original gift is clear, and I think there is not sufficient certainty in the subsequent words to restrict it.

Lord Cranworth. — My Lords, in looking at a will, such as the present one, very inartificially framed, and of which no construction is strictly and grammatically right, it is exceedingly difficult for different minds always to arrive at the same conclusion as to what is the construction which ought to be put upon the words used, no construction of which can be adopted with perfect accuracy. Since this case was argued at your Lordships' bar, I have looked at my own manuscript note of what took place upon the argument before me in the Court of Chancery, and I have not any memorandum or note that the distinction in this case between the personal and the real estate was pressed upon me. I think at the * bar it was said that it was adverted to, but that * 242 only proves to me that I had taken an incomplete note of what passed, for I have no memorandum of any distinction of that sort, though I have a tolerably accurate and full note of what passed, with some observations of my own, made for my own guidance during the progress of the argument.

I do not, however, mean to say that if that had been pressed upon me as distinctly as it was pressed at the bar of this House, I am at all satisfied that it would have altered my judgment. I cannot feel at all confident upon that subject, because after one has made up one's mind upon a construction of this sort, and had one's impressions, or prejudices (if you please so to call them), influenced by that, it is exceedingly difficult afterwards to say that you are entirely convinced that another construction would have

been open to less objection; though all the rest of your Lordships having come to that conclusion, the conclusion at which you have arrived is, I dare say, the correct conclusion. But I own that, after having read this will over and over again, it does not appear to me that the word "residue," as it is there used, can very aptly be confined to the real estate. "Residue" might well be confined to real estate when some real estate, ordinarily so called, had been previously given, and then the rest of it is given over. But here all that is given is that which a lawyer, it is true, knows to be of the quality of real estate; that is a charge upon the real estate; but after having given that charge, I should have thought the word "residue" was hardly that which we could suppose this testator to have used, meaning the whole real estate subject to the charge. This view of the case, I own, is rather confirmed in my mind by what follows, because where he says the division of my property is to be so and so, it looks to me as if he contemplated a division of the whole.

* 243 * I thought it right to make these few observations, but of course the order of the House will vary the decree as to the personal estate. What I would suggest, therefore, would be that the House should make a declaration that the decree should be varied, not as regards the real estate, but as regards the personal estate vested in the son, William Cass Randfield, and that with that declaration the case should be remitted to the Court of Chancery.

Decree appealed from varied.

Lords' Journals, 8 March, 1860.

THE ATTORNEY-GENERAL *v.* JOHN BRUNNING.

1860. March 5, 6, 23.

THE ATTORNEY-GENERAL, *Appellant.*
JOHN BRUNNING, *Respondent.*

Probate Duty. Sale of Estate.

All monies recoverable by the executor by virtue of the probate, in whatever form recovered, whether through the agency of a Court of equity or of a Court

of law, are part of the estate and effects of the testator, and are liable to probate duty.[1]

A., the owner of an estate, entered into a contract for the sale of it. Part of the purchase-money was paid as in his lifetime. The contract contained stipulations to the effect that certain alterations might be made in the formal agreement drawn up on the original contract, and, as the purchaser was a ward of Court, that the contract should be void if not approved by the Lord Chancellor. There were also articles as to the contract being rescinded through the act of the parties on the non-payment of the purchase-money, &c. Some alterations were made in the original contract; the testator had a good title; he died; and after his death, the formal approval of the contract was given by the Court of Chancery: —

Held, that the purchase-money was to be deemed part of the "estate and effects" of the testator within the 55 Geo. 3, c. 184, schedule, part 3, and was liable to probate duty.

THIS was an appeal against a judgment of the Court of Exchequer.

* W. Williams Hope, in May, 1851, made a will, by which * 244 he devised and bequeathed all his real and personal estate to Vinus Hodgkinson Crosby, his heirs, &c., absolutely, and appointed John Brunning, the respondent, sole executor. On the 4th of September, 1854, the testator entered into a written agreement with Mrs. Hungerford, the guardian of Miss Clara Thornhill (a ward of the Court of Chancery), to sell part of his real estate in the county of Northampton for a net sum of 115,000*l.*, exclusive of the payments of incumbrances.

By the agreement it was settled that the purchaser should pay down 15,000*l.* within three days after approval of the agreement by the Lord Chancellor; another sum, intended to cover certain incumbrances, in January, 1855, if counsel should then have approved of the title; and the remainder on the 25th of March, 1855 (with interest), when the purchase was to be completed; "but should the purchase not be completed and the purchase-money paid on that day, the vendor shall be at liberty, at any time after the 25th of March, 1855, to cancel the agreement and sale, returning what had already been paid, without interest or costs, unless the completion of the purchase shall be delayed beyond that time through the clear and obvious fault or neglect of the vendor." A proper contract embodying these terms was to be forthwith prepared, and signed by or on behalf of both parties. If the contract

[1] Partington *v.* The Attorney-General, Law Rep. 4 H. L. 106.

was not confirmed by the Lord Chancellor, the same was to be null and void. This contract was confirmed by the Court of Chancery on the 28th December 1854. Before that day the sum of 15,000*l.* had been paid into the hands of a third person as a deposit on account and in part of the purchase-money. The testator died in January, 1855. Probate was granted in June, 1855, and the property was sworn under 10,000*l.* The testator had a good title to the estate, and the same was afterwards approved of * 245 by the Court * and accepted by the purchaser. The whole of the purchase-money was then paid. On the 10th June, 1858, the Attorney-General (Sir F. Kelly) filed an information in the Court of Exchequer, which, after stating the circumstances, prayed that it might be declared that the purchase-money, 115,000*l.*, ought to be treated as forming part of the testator's estate, and to be liable to probate duty. The respondent put in an answer to this information, and the cause was argued, and on the 31st of January, 1859, the Court of Exchequer rejected the prayer of the information.[1] This appeal was then brought.

The Attorney-General (*Sir R. Bethell*), and *Sir Hugh Cairns* (*Mr. Hanson* was with them), for the Crown.—When a contract for the sale and purchase of an estate, to which there is a good title, has been made, the contract has changed the ownership; the purchaser is the owner of the estate, the vendor the owner of the money, which is a credit forming part of his estate and effects. The vendor of the estate dies; his executor is entitled *de jure* to receive the money, and to give a discharge for it. What confers on him the title to do this? It is the probate which gives legal recognition and validity to his title as executor. Legacies are affected by the domicile of the testator, but the probate attaches on every thing which is collected within the jurisdiction where the probate is granted. If the executor, having probate here, wants to collect funds of the testator in Spain or France, he must take out an ancillary administration in each country, and must recover and give discharges according to the foreign law; *Attorney-* * 246 *General* v. *Hope*;[2] but whatever he recovers in this * country, he recovers by virtue of the title conferred on him by the Ordinary here.

[1] 4 H. & N. 94.

[2] 2 Clark & F. 84.

ke in the Court below was, in supposing that the oney did not belong to the executor, and that he could ver it as damages to the personal estate.[1] *Matson* v. as referred to, and misapplied in the Court below. That case of conversion between the heir and personal repre- tive, but here it is a case of sale; and if this contract is , it is a complete transfer of the estate in equity. *Custance Bradshaw*[3] was a case of the same sort, and was equally relied n by the Court below, and was mistaken in the same manner. In neither of these cases was there any contract, and therefore there was no credit arising to the executor. The real question in each of those cases was as to the power of the Court to compel the conversion of the real estate. Here it is not a mere case of conversion, but a case of sale, and, as the contract was valid, the property was, in equity, completely transferred. Here the contract of sale was made by the testator himself; it was binding upon the land, and so no question of mere conversion could arise, for the land was not merely directed to be sold, but was actually sold. This testator at the time of his death was the owner of the money and not of the estate, and the executor was therefore the owner of the money through the probate; *Brown* v. *Coates*.[4] And if both vendor and purchaser had died, the executor of the purchaser would have had a right to deduct the 100,000*l.* from his testator's estate, as a debt legally payable therefrom, and not liable to duty. The reference, therefore, made by the Court below[5] to Williams on Executors, and the case of *Barker* v. *May*,[6] do not apply.

* The distinction as to the payment of duty, assumed by * 247 the Court below to exist between debts recoverable at law, and those which are only recoverable in equity, cannot be supported. A testator might die entitled to legacies charged on land, or possessed of an equitable interest in a bond debt, or entitled to a mortgage in which there was no covenant to him or to his estate to pay the money, so that the relation of debtor and creditor might never be created, and relief must be sought, not at law, but in equity. Yet in all these cases the executor would have a *credit* on which probate duty would be payable, for it would form part of

[1] 4 H. & N. 106.
[2] 8 Beav. 368.
[3] 4 Hare, 315.
[4] 1 Add. Eccl. 345, and n. (*a*).
[5] 4 H. & N. 111.
[6] 9 Barn. & C. 489.

was not confirmed by the Lord Chancellor, the same was to be null and void. This contract was confirmed by the Court of Chancery on the 28th December 1854. Before that day the sum of 15,000*l.* had been paid into the hands of a third person as a deposit on account and in part of the purchase-money. The testator died in January, 1855. Probate was granted in June, 1855, and the property was sworn under 10,000*l.* The testator had a good title to the estate, and the same was afterwards approved of * 245 by the Court * and accepted by the purchaser. The whole of the purchase-money was then paid. On the 10th June, 1858, the Attorney-General (Sir F. Kelly) filed an information in the Court of Exchequer, which, after stating the circumstances, prayed that it might be declared that the purchase-money, 115,000*l.*, ought to be treated as forming part of the testator's estate, and to be liable to probate duty. The respondent put in an answer to this information, and the cause was argued, and on the 31st of January, 1859, the Court of Exchequer rejected the prayer of the information.[1] This appeal was then brought.

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the "estate and effects" of the deceased. In respect of what is a probate granted? It is in respect of "goods, chattels, and *credits*," which last word cannot be restricted to such things only as can be recovered at law, but must equally extend to all those which are recoverable in equity. Equally mistaken was the Court below in treating this money as equitable assets only; *Barker* v. *May*[1] does not establish that proposition. The land came to the executors not as devisees simply, but as devisees charged with a trust, and of course in that way constituted equitable assets; but the present is not a case of a mere direction to sell, but a case of a sale made by the testator himself. The distinction between legal and equitable assets does not refer to the nature of the assets, but to the remedy which a creditor has against them, and consequently cannot affect the liability of the assets to the probate duty.

Cook v. *Gregson*[2] well illustrates the distinction between legal and equitable assets. That was the case of an equity of redemption in a sum of money charged upon real estate, which * 248 Vice-Chancellor Kindersley held to * constitute legal assets in the hands of the executor. His Honor there said, "much difficulty has sometimes arisen in determining the precise distinction between legal and equitable assets. The general proposition is clear enough, that when assets may be made available in a Court of law, they are legal assets; and when they can only be made available in a Court of equity, they are equitable assets. This proposition does not, however, refer to the question whether the assets can be recovered by the executor in a Court of law or in a Court of equity; the distinction refers to the remedy of the creditor, and not to the nature of the property. The question is not whether the testator's interest is legal or equitable, but whether a creditor of the trust seeking to get paid out of such assets can obtain payment thereout from a Court of law, or can only obtain it through a Court of equity. That, I apprehend, is the true distinction. And in Williams on Executors,[3] instances are given of assets recoverable only through equitable means being treated as legal assets. They are so here.

In the Court below, the case of damages to be recovered by the widow from the person who had negligently occasioned the death

[1] 9 B. & C. 489.
[2] 3 Drewry, 547.
[3] Pt. IV. bk. 1, c. 1, p. 1522.

of her husband was put as an illustration of the present, but the two cases have not the least resemblance to each other; for such damages do not form part of the husband's estates, but, by statute, belong to the widow in her own right. And the jury may direct their distribution.

Mr. Roundell Palmer, and *Mr. Osler*, for the respondent. — The duty cannot be held chargeable here unless it can be * charged at any time on a mere right to recover dam- * 249 ages for breach of a contract. Such damages cannot be treated as assets subject to duty. They do not fall within the words " estate and effects," in the 55 Geo. 3, c. 184. Those words must refer to estate and effects properly so called at the time of the death of the testator, and a mere credit which may exist in the shape of a claim to unliquidated damages cannot be so considered, and unliquidated damages do not come under that name.

[THE LORD CHANCELLOR. — Do you say that an unliquidated debt is not part of the estate and effects of a testator?]

It would not be so if the covenant was not broken at the time of the death; it might be so if the covenant was then broken. So the thing liable to duty must be something which would pass, as in bankruptcy. Unliquidated damages will not so pass. For instance, damages in respect of breach of a covenant to insure against fire would not be the subject of duty; it must be something which could be valued, something which in the words of the provisions, in the statute for penalties on non-payment of the duty, might be the subject of " mistake or misapprehension." Such damages could not be known or valued at the time of taking out probate, and therefore could not be the subject of mistake or misapprehension. All actions capable of being transmissible to an executor, do not mean " credits " within the language of the probate, or " estate and effects " within the terms of the statute. An action against an attorney for negligence, whereby the estate of the testator was materially diminished, might bring a large sum of money to the estate, and the right to bring such an action would pass to the executor, yet it could not be treated for the purposes of duty as assets in his hands. The duty here is claimed in respect of money which it is said the executor will obtain through the authority of the Ordinary, by means * of the * 250

probate, and it is supposed that all such money might have gone to the Ordinary to be dispensed in pious uses. For the Ordinary and executor have been treated as identical. But they are not so. Lord Brougham clearly points out that in *The Attorney-General* v. *Hope*.[1] A contract like this never was subject to the jurisdiction of the Ordinary. This money was no more recoverable by the executor under the probate, than if it had formed part of the testator's property in foreign funds: *The Attorney-General* v. *Hope*, and *The Attorney-General* v. *Dimond*,[2] where it was so held, though the foreign funds came into the hands of the executor in this country, to be administered here.

Even supposing the possession of the land transferred, still the money claimed under this contract is not a debt at law: *Hallen* v. *Runder*,[3] where Mr. Baron Parke says, "the mere act of giving possession of the land would not be sufficient to maintain the *indebitatus* count for goods bargained and sold, but an actual conveyance of the land to the defendant must be shown." In *Green* v. *Bicknell*,[4] the question was, whether a particular contract concerning oil was a provable debt under a bankruptcy, and it was held not to be so. The contract did not constitute a debt; it only gave a title to damages. So in *Pearse* v. *Pearse*,[5] a testator held Indian stock, payable in India; a short time before his death he accepted an offer of the East India Company to have it converted into stock registered payable and recoverable in England, but this was not effected till after probate had been taken out; it was then held that no probate duty was payable on such * 251 * stock. The Vice-Chancellor there said, "All that the Court has to do in deciding the present question, is to consider what was the position of the property at the time when the probate was granted; whether there was any agreement respecting it is immaterial."

The expression that equity treats the vendor as a trustee of the land for the purchaser, is one which does not affect the rights of either party, but merely describes the mode or rule of proceeding of the Courts of equity. In *Lawes* v. *Bennett*,[6] there was a lease for seven years, and on that was endorsed an agreement, that if

[1] 2 Clark & F. 90; 1 Cromp., M. & R. 557.
[2] 1 Cromp. & J. 356.
[3] 1 Cromp. M. & R. 271.
[4] 8 A. & E. 701.
[5] 9 Sim. 430.
[6] 1 Cox, 167.

the lessee should within a limited time desire to purchase, the lessor would convey the premises to him for a sum then agreed on. After the lessor's death the lessee declared his option to purchase on this agreement; and it was held that he had the right to do so; and that the effect of his exercise of this option was to convert the purchase-money into the personal estate of the testator. Up to that time the land had retained the character of his real estate. In *Wall* v. *Bright*,[1] all this subject was fully considered. The question there was, whether an estate contracted to be sold passed by a devise to trustees in trust to sell; and it was held that it did.

The probate duty here is not payable, because at the time of the testator's death the money had not been paid for the estate. The question of liability must be determined at the time of the death, and, so determined, the estate here was land, and was not liable to duty. It may be that in equity it was bound by the contract, but it is not liable to duty. It is bound by the contract even to this extent, that the purchaser may devise the equitable estate, but * that is only because equity acts upon the intention of the * 252 parties: but that is not to be extended beyond the necessity of the case. *Matson* v. *Swift*,[2] and *Custance* v. *Bradshaw*,[3] show that though in that way equity treats the conversion complete as from the date of the agreement, it does not treat the contract as equivalent to a conveyance by regular evidence of intention, and therefore it compels the vendor, and those who represent him, to do what it was intended he should do, and adjusts the rights of the parties at the last moment, as if the contract had at the first moment been carried into effect.

Land bound by contract never was within the jurisdiction of the Ordinary. This was at the time of the death land which belonged to the testator, and which he had contracted to sell, but which could not be taken from him except after the payment of a certain sum of money. There was a contract of this sort in *Custance* v. *Bradshaw*, yet the duty was held not to be payable. In *Myers* v. *Perigal*,[4] a share in a partnership, part of whose assets was invested in land, was held not be an interest in land. [LORD WENSLEYDALE. — No individual partner had an interest in the land, but only in the produce of it after it had been dealt with for the

[1] 1 Jacob & W. 494.
[2] 8 Beav. 368.
[3] 4 Hare, 315.
[4] 2 De G., M. & G. 599.

law, and there would have been no purchase-money on which probate duty could have been demanded. But although the right to the purchase-money was on the condition of a good title being shown and the conveyance being executed, when the condition had been performed it was the same in the result as if the right had been absolute from the beginning. There are many rights which vest in executors subject to conditions precedent or subsequent; but when the condition has been performed, and those rights have produced assets in the hands of the executor, can he contest any of his liabilities, as holder of these assets, by saying that from the not happening or the happening of some contingency, it was uncertain whether the assets would ever come into his hands? The objection certainly would not avail him against the claim of a creditor; and I do not see how it should avail him against the claim of the Crown for probate duty.

It is then urged that probate is only to be granted of that which is of definite value; that the executor could have put no * 256 definite value on his right to sue upon the * contract; and that an executor might as well be called upon to include, in his return of the estate and effects of the testator, the value of his hope of recovering damages under a recent Act of Parliament, if the testator had come to his death by the negligence of a railway company. But this is only a renewal of the objection that the only course for the executor to take was to sue for damages in respect of the breach of contract, waiving his remedy by bill for specific performance, or by petition, by which the exact amount of the purchase-money might have been recovered. The sum to be recovered, in case of death by negligence, certainly would not be subject to probate duty, for it is not made part of the estate of the deceased; and, on the contrary, the Act of Parliament directs it to be apportioned among the members of the family of the deceased, according to the pecuniary loss which they are supposed respectively to have suffered from the bereavement.

Again, it is said that the purchase-money, if recovered by suit in equity, would not be liable to probate duty, because it would be equitable assets. But I am inclined to think that all monies recovered by the executor, as executor, by virtue of the probate, must be considered legal assets. And at any rate, I am clearly of opinion that all monies which the executor recovers by virtue of the probate, must be considered part of the estate and

effects of the testator, and subject to probate duty, whether legal or equitable assets, although equitable assets are differently dealt with by a Court of equity, in payment of debts and incumbrances.

We are then carried back into antiquarian lore, and told that nothing can be considered the estate and effects of a testator in the hands of his executor, which the Ordinary could not have realised by due course of law, when he was entitled to collect the personal property of the faithful * deceased, to be * 257 applied *in pios usus.* I am strongly inclined to believe that in those remote times the payment to the Ordinary of debts due to persons who had departed this life, was enforced, like the payment of church rates, only by suit in the Ecclesiastical Court or by ecclesiastical censures. But I do not understand why the Ordinary might not have called in the aid of a Court of equity as well as of a Court of law. Money due on mortgage has always been considered personal estate. If, by the aid of a Court of equity, the Ordinary had recovered the mortgage money, it must have been part of the personalty of the deceased, to be applied *in pios usus.* Mortgage money now recovered by an executor, by the aid of a Court of equity, would certainly be assets, and liable to probate duty. And I am unable to distinguish between mortgage money and purchase-money recovered in the same manner. So the question seems to me to stand upon principle.

The cases of *The Attorney-General* v. *Dimond*, and *The Attorney-General* v. *Hope*, are cited as authorities against the Crown. But they have no application to this case, as they turned entirely upon the Ordinary having no jurisdiction over the public funds of a foreign government. *Matson* v. *Swift*, and *Custance* v. *Bradshaw* are more in point. But when these two cases are examined, neither of them will be found an authority to support this judgment, for in neither did the executor receive the money *qua* executor by virtue of the probate; and in both cases, at the time of the death of the testator, the property was *de facto* land, and nothing but land, belonging as land to the testator, and it was still land after the death of the testator, and not money, although the proceeds of the land, when sold, were to be distributed as personalty.

We have been very properly cautioned against holding that property is liable to taxation, without the clear authority * of the Legislature for that purpose. But no reason has * 258

been suggested why this sum of money, which does form part of the personal estate of the deceased, should be exempted from the tax imposed on the residue; and I am clearly of opinion that this sum of money, within the meaning of 55 Geo. 3, c. 184, § 2, is part of the estate and effects of the testator, in respect of which the probate was granted.

I must therefore advise your Lordships that the judgment for the defendant should be reversed, and that judgment should be entered for the Crown.

LORD CRANWORTH. — My Lords, I have very little to add to what has fallen from my noble and learned friend. Mr. Hope, at his death, was absolutely entitled to the money for which he had agreed to sell this estate. His right was just as if the purchasers had invested a sum of 115,000*l.*, or so much of it as was unpaid, in their names, and had declared a trust thereof in his favour in the event of their being able to make a good title, which they could and did make. With all deference to the Court of Exchequer, I think that Court fell into an error in treating this money as being equitable assets. It is a sum which the executor would take as executor, and which, therefore, would be legal assets in his hands. His right would not depend on any thing contained in the will of Mr. Hope. Mr. Hope's administrator would have been entitled in case he had died intestate; and what an administrator is entitled to recover as administrator, *virtute officii*, can never be equitable assets.

In considering whether assets are legal or equitable, the question is not whether the money is recoverable through the * 259 agency of a Court of equity or the agency of a Court * of law, but whether it is money which the personal representative is entitled to recover independently of any directions of the testator. The portions of younger children charged on the family estate are generally only recoverable in equity, but they are certainly legal, not equitable assets. So money due to a mortgagee in fee, where the mortgagee is not a creditor by covenant or otherwise, and where, therefore, there is no legal remedy. And instances might be multiplied indefinitely.

This doctrine is entirely consistent with the decision in *Barker* v. *May*;[1] for there the title of the legatee was derived wholly

[1] 9 B. & C. 493.

under the will of the testator, whereas in the cases I have put the testator could not affect the right of those whose claims were in question. I have thought it necessary to observe on this mistake into which the Judges below inadvertently fell, because, if it had passed unnoticed, it might have misled executors hereafter in the discharge of their duties.

The question, however, does not turn on the point whether assets are legal or equitable. Whether legal or equitable, if recoverable by virtue of the probate, probate duty is payable. In support of the judgment below, it was contended that in this particular case the assets, whether legal or equitable, were not subject to probate duty. Mr. Palmer, in his able argument, endeavoured to liken the case to that of a testator dying leaving assets in a foreign country. There is no doubt that such assets are not liable to probate duty. They are not recoverable by virtue of an English probate, and when they come to the hands of the executor they so come because he has established a title in a foreign jurisdiction.

Mr. Palmer argued, that real estate in this country is, or * rather before the late change in the law was, as much out * 260 of the jurisdiction of the Ordinary as goods in a foreign country. No doubt the Ordinary had no means of affecting real estate. But that is not the point. When a person dies entitled to a sum of money charged on a real estate, that estate, or the owners of that estate, may be considered in contemplation of law, for purposes of probate, as his debtor. His rights are, for purposes of probate, the same as if a declaration of trust had been made by the owners in his favour for the amount of the charge.

The real estate is but a security, and the Ordinary certainly was entitled to all debts due to the deceased. That is precisely the present case.

The cases relied on before Lord Langdale and Sir James Wigram are clearly distinguishable from the present case. In *Matson* v. *Smith*, before Lord Langdale, the estate remained real estate at the death of the testator, and was only convertible into personalty by virtue of his direction; a direction, it is true, declared not by his will, but by a previous deed, but which he might have revoked or varied by his will if he had thought fit. And the conversion into personalty, therefore, may truly be treated as having depended

on his will. In *Custance* v. *Bradshaw*, Sir James Wigram proceeded on the same ground, namely, that at the death of the testator the property in question was real estate, and that if it was ever to lose that quality, it would be by some act to be done after the testator's death, and which might never become necessary.

These cases, therefore, do not support the proposition for which they were cited. And on the short ground that this sum of money formed part of the testator's personal estate in this country at his death, being a sum of money recoverable by his personal representatives, I am clearly of opinion that it is liable to pro-
* 261 bate duty, and I concur * in the motion of the Lord Chancellor, that the judgment below should be reversed.

Lord Wensleydale. — My Lords, I concur with my noble and learned friends in the opinion that the Court of Exchequer has taken an erroneous view of this case, and that the judgment ought to be reversed, and judgment given for the Queen.

By the 55 Geo. 3, c. 184, § 2, a duty is imposed upon a probate according to the value of the estate and effects for and in respect of which it is granted, and an affidavit is required that the estate and effects are under some particular value, and in case too high a duty is imposed in the first instance it is to be returned, or, if too little duty is paid, the difference is to be made good.

In this case the right to enforce the contract of sale entered into by Mr. Hope, the testator, belongs to his executor. That right is a part of his estate and effects, and the probate is a necessary instrument to support his claim at law or in equity. And the question is with what amount of stamp it ought to be impressed in respect of the value of that right. The judgment of the Court of Exchequer that it need not be stamped with any proceeded upon three grounds: first, that under this statute no duty is imposed unless the estate and effects are of some definite value, otherwise no one could make an affidavit of the amount; secondly, that although when a binding contract of sale was made by a testator, he became a trustee of the land in equity for the purchaser, and the vendee a trustee for the price, yet upon the death of the vendee the estate still remained real estate, and the right to the price was not personal estate belonging to the executor; and thirdly, that the right to the produce of the sale was equitable

* assets, and no probate duty on the amount of equita- * 262
ble assets was payable by law.

I think that none of these reasons when duly considered is sufficient. First, I am not aware of any authority which limits the duty payable to liquidated demands only. Rights incapable of exact valuation unquestionably vest in the executor as a part of the personal estate. Actions for goods damaged, and for uncertain damages caused by breach of contract not relating to the person, and for damages to the real estate under 3 & 4 Wm. 4, c. 28, "for the further amendment of the law," all vest in the executor; none can be recovered without a probate stamped to a proper amount to cover the sum to be recovered, and yet in all these cases the amount is unliquidated. A stamped probate, or letters of administration to cover the sum to be recovered, is always necessary where the title of the executor or administrator is put in issue. That was laid down in the case of *Hunt* v. *Stevens*.[1] The difficulty in fixing the precise amount is remedied by the provisions in the statute assuring the return of the duty if the valuation is too high.

The dictum of Lord Tenterden in the case of *Moses* v. *Crafter*,[2] which was cited in the judgment in the Court of Exchequer, that desperate and doubtful debts may be omitted, does not apply here; for there is no pretence to say that this claim fell under that description, nor can it be said that the executor has really any discretion to avoid introducing property of any kind.

The second reason on which the judgment has proceeded, arises from a misapprehension of the two cases of *Matson* v. *Swift*,[3] before Lord Langdale, and *Custance* * v. *Brad-* * 263
shaw,[4] before Vice-Chancellor Wigram. In neither of those cases was there any change of the nature of the property created by the obligation of a binding contract. Here there was a contract binding on the testator, and on the purchaser, by virtue of which the former had a right to the stipulated purchase-money on completing the purchase; and the latter had a like right to the estate. At law the executor would have a right to recover, not the price, for no action would lie for it as a debt until after the conveyance had taken place, but for damages for not completing the purchase. If the land was of less value than the agreed

[1] 3 Taunt. 113.
[2] 4 Car. & P. 524.
[3] 8 Beav. 368.
[4] 4 Hare, 315.

price, an action would lie for the difference in value. If equal, the claim would be merely nominal. But in equity the testator, at the time of his death, had a claim for 115,000*l.* in the event of a good title being made out, and that claim devolved on the executor, and might have been easily valued, as of the full price payable at the date of the intended conveyance, if the title was good; and if from any unforeseen circumstance it had turned out to be defective, the executor would have been allowed a deduction upon the amount paid. To allow some uncertainty as to the value of the right to personalty to be an excuse for not swearing to the amount, and to prevent the tax from being payable on the amount, as being unliquidated, would greatly diminish this head of revenue.

The third ground fails also. The right of action or suit in equity on the contract belonged to the executor in that character, and was assets at law. It is, I apprehend, a mistake to treat the price of an estate contracted by the testator to be sold, and afterwards received by the executor as proceeds of the real estate in the hands of an executor, in the sense that makes the pro- * 264 ceeds of real estate equitable * assets. If lands were devised to executors to be sold, or devised to be sold by executors for payment of debts and legacies, the proceeds would be equitable assets; independently of the provisions of the statute 3 & 4 Wm. 4, c. 104, the executor would hold them in the character of trustee for the creditors and legatees. But the sums received by an executor on a personal contract with the testator are legal assets; they belong to him in his character, and by virtue of his office of executor, and are therefore legal assets. In this respect there has been a mistake in the judgment delivered in the Court of Exchequer by Baron Martin. I am of opinion, for these reasons, that I ought to advise your Lordships to reverse the judgment.

Lord Chelmsford.—My Lords, the question in this case is, whether the amount of the purchase-money agreed to be given for a freehold estate of the testator, constituted at the time of his death part of his personal estate, and as such is liable to probate duty.

The test proposed by the Judges in the Exchequer for the determination of this question, namely, "whether the purchase-money

of a freehold estate contracted to be sold, but not conveyed at the death of the testator, is legal or equitable assets," is inapplicable. If the case could be determined upon this distinction it would be adverse to their decision, because there can be no doubt that money due upon a contract of sale entered into by a testator, and received by his executor after his death, would be legal and not equitable assets.

The proposition that the proceeds of the sale of real property are equitable and not legal assets is also much too broadly stated, and the case of *Barker* v. *May*,[1] which * is referred * 265 to as an authority in support of it, merely establishes that the proceeds arising from the sale of an estate devised to executors in trust to sell and to form part of the personal estate, are equitable assets. And I agree in the opinion expressed by Vice-Chancellor Kindersley, in *Cook* v. *Gregson*, that "every item of property which the executor has recovered or had a right to recover *virtute officii*, that is, which he would have had a right to recover if the testator had merely appointed him executor without saying any thing about his property or the application thereof," is legal assets.

It appears to me that the real question to determine is, whether at the time of the testator's death there was a valid and binding agreement for the sale of his estate, which was enforceable by his executor against the purchaser. Now there can be no doubt that there was such an agreement, and whether to be specifically performed in its original form, or with additional terms and conditions, is wholly immaterial.

This being established, we may adopt the language of the Master of the Rolls in *Lawes* v. *Bennett*[2] and say, "It is very clear that if a man seised of a real estate contract to sell it, and die before the contract is carried into execution, it is personal property of him." It certainly seems extraordinary that property which is recoverable by the executor *virtute officii*, which belongs to the next of kin and not to the heir at law, and which has the character of personalty thus impressed upon it in every other respect, should lose that character solely in relation to fiscal liabilities. It is difficult to understand upon what principle the conversion into personalty is to stop short of this point.

[1] 9 B. & C. 489.

[2] 1 Cox, 171.

* 266 * The cases which have been cited as authorities for that position are clearly distinguishable from the present case. In *Matson* v. *Swift*, and *Custance* v. *Bradshaw*, although conversion might have taken place, yet in neither case was it necessary. In the former, so much of the estate only might have been sold as would have been sufficient to pay the charges, and the remainder would have continued to retain its character of real estate. In the latter the land which formed part of the partnership property might have been taken and dealt with by the partners as land. And in neither case could the Crown control the wishes of the parties and insist upon a sale by them, merely for the purpose of rendering the property liable to probate duty. Those cases are, therefore, totally different from the present, where the conversion was complete at the death of the testator, and the property beyond the power of either party to recall it to its former state and condition.

Stress has been laid upon the circumstance, that the right to the purchase-money was contingent, as the vendor might have been incapable of making a good title, or the purchaser might have been unable to pay the purchase-money, or the agreement might have been cancelled. How far a release of the contract would deprive the Crown of the right to the probate duty which attached upon the death of the testator, it is unnecessary to consider. But the fact of the contract being contingent does not deprive the purchase-money of the character of personal estate when it is completed. Suppose the vendor's representative had returned the purchase-money for probate duty (as probably he ought to have done), and afterwards the contract had gone off, I apprehend he would have been entitled to a return of the duty under the 40th section of the 55 Geo. 3, c. 184.

It was suggested in the course of the argument, that the * 267 * purchaser might have died before the performance of the agreement, and it was asked what would then have happened? No doubt his personal representative must have returned the whole of his personal estate as it existed at the time of the testator's death, and must have paid probate duty upon it, but afterwards upon the contract being performed he would have been entitled to a return of the duty under the 23d section of 5 & 6 Vict. c. 79, the purchase-money being clearly a debt payable out of the personal estate. And in the case (which was also sup-

posed) of both vendor and purchaser dying before the completion of the contract, there would have been no difficulty in adjusting the liabilities of the parties according to their respective rights and interests in the manner previously described.

I agree, therefore, with my noble and learned friends in thinking that the judgment of the Court of Exchequer is erroneous, and ought to be reversed.

LORD KINGSDOWN. — My Lords, I am entirely of the same opinion.

THE LORD CHANCELLOR. — My Lords, I observe that in the judgment in the Court of Exchequer there was a declaration, that the said sum of 115,000*l.* did not form part of the personal estate at the death of Williams Hope, and is not liable to probate duty. Perhaps it may be right, in our judgment, to make a similar declaration, leaving out the word "not."

Decree appealed from reversed, with declaration.

Lords' Journals, 23 March, 1860.

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* COX AND WHEATCROFT v. HICKMAN. * 268

1860. June 26, 28; July 6; August 3.

S. W. COX and D. WHEATCROFT, *Appellants.*
JOHN HICKMAN, *Respondent.*[1]

Partnership. Bills of Exchange. Deed of Arrangement with Creditors.

S. and S., trading in that name, becoming embarrassed, executed a deed, to which they were parties of the first part; certain of the creditors, as trustees, of the second part; and the general scheduled creditors (among whom the trustees were named) of the third part. The deed assigned the property of S. and S. to the trustees, and empowered the trustees to carry on the business under the name of the "Stanton Iron Company;" to execute all contracts

[1] Oakes v. Turquand, Law Rep. 2 H. L. 331; Reese River Silver Mining Co. v. Smith, Law Rep. 4 H. L. 70.

and instruments necessary to carry it on; to divide the net income to be taken among the creditors in ratable proportions (such income to be deemed the property of S. and S.), with power to the majority of the creditors, assembled at a meeting; to make rules for conducting the business, or to put an end to it altogether; and after the debts had been discharged, the property was to be re-transferred by the trustees to S. and S. Two of the creditors, C. and W., were named among the trustees. C. never acted. W. acted for six weeks, and then resigned. Sometime afterwards, the other trustees, who continued to carry on the business, became indebted to H., and gave him bills of exchange, accepted by themselves, "Per proc. the Stanton Iron Company:"

Held, that there was no partnership created by the deed, and that consequently C. and W. could not be sued on the bills as partners in the company.

Held, also, that they could not be sued for goods sold and delivered, there being no distinction upon the question of liability between the bills and the consideration for which they were given.

THIS was an action on three bills of exchange, given by one of the managers of the Stanton Iron Company, for goods supplied to that company. The declaration contained a count in the usual form as against acceptors on each bill, alleging it to have been "directed to the defendants by and under the name of the Stanton Iron Company;" also counts for goods sold and delivered, and the money counts. The defendants severed in pleading, each denying the acceptance of the bills; and, as to the other counts, pleading never indebted.

For some time previously to the year 1849, Benjamin * 269 * Smith and Josiah Timmis Smith carried on business at the Stanton Iron Works, in Derbyshire, as iron masters and corn merchants, under the name of B. Smith and Son. In that year they became embarrassed in their circumstances, and a meeting of their creditors took place. Among these were Cox and Wheatcroft. On the 13th November, 1849, a deed of arrangement was executed by more than six-sevenths in number and value of the creditors. The parties to this deed were the Smiths, of the first part; Francis Sandars, John Thompson, James Haywood, David Wheatcroft, and Samuel Walker Cox, all of whom were creditors, of the second part; and the general creditors (including those previously named as trustees), whose names were also set forth in a schedule, of the third part. The deed recited a lease from 1846 for twenty-one years to the Smiths, that they were unable to pay their debts, and that it had been agreed that there should be an assignment by them to the parties of the second part, as trustees on behalf of the creditors, to have and hold the prem-

ises for the term of the lease, the machinery, &c., and all the estate, &c., subject to the powers and provisions thereinafter contained. The trusts were then enumerated, and, in substance, they were to carry on the business under the name or style of "The Stanton Iron Company," with power to do whatsoever was necessary for that purpose, and to pay the net income, after answering all expenses; which net income was always to be deemed the property of the two Smiths, among the creditors of the Smiths. And provision was made for the meetings of the creditors; and, at any such meeting, a majority in value of the creditors present was to have the power to make rules as to the mode of conducting the business, or to order the discontinuance of it. And when all the debts had been paid, the trustees were to hold the trust estates, &c., in trust for the two Smiths. The deed contained a covenant by the parties * executing it, not to sue * 270 the Smiths for existing debts. Cox never acted as trustee; and Wheatcroft resigned six weeks after the execution of the deed, and before the goods for which the bills were given had been supplied; no new trustee was appointed in the room of either. The business of the company was carried on by the three other persons named as "parties of the second part." In the course of it goods were supplied by Hickman, who, in March, April, and June, 1855, drew three bills of exchange in respect thereof. The first of these bills, which was the same in form as those afterwards accepted, was in these words: —

"GRAFTON IRON ORE WORKS, BLISWORTH,
"£300. 10th March, 1855.

"Four months after date pay to my order, in London, three hundred pounds, value received. JOHN HICKMAN."
"To the STANTON IRON COMPANY, near Derby."

The acceptance was in the following form: "At Messrs. Smith, Payne & Co., London. Per proc. The Stanton Iron Company. — James Haywood."

The cause was tried in 1856, before the late Lord Chief Justice Jervis, when a verdict was found for the defendants; but on motion on leave reserved, the verdict was entered for the plaintiff.[1]

[1] 18 C. B. 617.

The case was taken to the Exchequer Chamber, when three Judges, Justices Coleridge, Erle, and Crompton, were for affirming the judgment of the Common Pleas, and three other Judges, Barons Martin, Bramwell, and Watson, were for reversing it.[1] The judgment, therefore, stood, and was afterwards brought up to this House.

* 271 * The Judges were summoned, and Lord Chief Baron Pollock, Mr. Justice Wightman, Mr. Justice Williams, Mr. Justice Crompton, Mr. Baron Channell, and Mr. Justice Blackburn, attended.

The Attorney-General (Sir R. Bethell, Mr. Milward was with him), for Wheatcroft. — The claim against the appellants proceeds on the ground of a supposed partnership among the creditors of the Smiths in the Stanton Iron Works. There was none. The measure of the interest of each creditor who signed the deed is the amount of his debt. That interest is limited and defined. Yet the Court below has held that each creditor, although having only this defined interest, becomes a partner in the company and incurs an indefinite liability. That doctrine cannot be supported. It is contrary to all the principles of partnership.

The facts here do not give any right to Hickman to maintain this action, for if he had heard that Cox and Wheatcroft had been named in the deed as trustees, he must have heard at the same time that Cox never acted in that character, and that Wheatcroft resigned the trust. The trustees who acted in the business are the only persons liable on these bills. The ownership of the property here never was changed at all. The trustees were by the deed to have possession of it for a certain time, but the property itself remained that of the Smiths, to whom it was to be restored if all the debts should be paid. The joint creditors, who are in fact incumbrancers, have the power to say whether the arrangement shall continue; but that amounts to no more than saying that the security given for their debts be put an end to. It is said that the man who participates in carrying on a trade is a partner in it; that is so under ordinary circumstances, but not

[1] 3 C. B., N. S., 523. The case was also before the Master of the Rolls (nom. Re Stanton Iron Company, 21 Beav. 164) under the Winding-up Acts, when his Honor held, that such a company as existed under the deed was not within those Acts.

under such circumstances * as exist here. If these trus- * 272
tees had found, upon the estate leased to the Smiths, and of which they were in possession for a time, a lode of mineral producing 100,000*l.* in a year, the creditors would not have participated therein as partners; they would have got their debts paid a little earlier. The property would still have been that of the Smiths. If they had been partners, the creditors might put the whole into their own pockets; as persons to be satisfied under that deed they had no power to do so. There was no profit here, nor any thing in the nature of profit, till the creditors were paid.

A qualified benefit derived from a trade does not make a man a partner in it; *Grace* v. *Smith*,[1] *Mair* v. *Glennie*.[2] It is only when men share profits generally and indefinitely that they become partners: *Waugh* v. *Carver*,[3] where the two persons were to share in agreed proportions all the profits of their respective trades. *Cheap* v. *Cramond*[4] proceeded on that principle. Neither of these cases resembles the present.

[THE LORD CHANCELLOR. — But it is not in respect of receiving money alone, but in respect of the authority to employ those who carry on the business that a partnership may be created.]

As to that, the nature of the property and of the trade must be considered. The property was that of the Smiths, the creditors had a charge upon it; the power to deal with it came from the owners, who gave the use of it to the trustees, subject to certain conditions, and who were to be repossessed of it when the object of the deed had been fulfilled. In *Owen* v. *Body*,[5] an assignment of this sort was held bad, because it contained terms which might * make the creditors executing the deed members of * 273
a partnership, and might thus, as the deed was given for the benefit of all the creditors, impose on creditors who did not execute it terms to which they were not bound to submit. In *Pott* v. *Eyton*,[6] it was distinctly laid down that it must be the taking of a share of the profits, not the receipt of a percentage on sales, which would constitute a partnership. That is the doctrine adopted in all the text-writers on partnership, Collyer,[7] Story,[8] and

[1] 2 W. Bl. 998.
[2] 4 Maule & S. 240.
[3] 2 H. Bl. 235.
[4] 4 B. & Ald. 663.
[5] 5 A. & E. 28.
[6] 3 C. B. 32.
[7] p. 53.
[8] C. 4, § 55, 56.

Lindley,[1] and unless the profits as such are taken, there can be no pretence to say that a partnership has been created.

Mr. Welsby (*Mr. Boden* was with him) for Cox. — This is an action on a bill. The defendant can only be rendered liable on it in one of three ways: first, by putting his name to the bill; secondly, by giving authority to some one else to put it; or thirdly, by holding himself out to the world as having given that authority. On the first and third of these points, there is no pretence for saying that the defendant is liable. Is he so on the second? This case is part of the law of principal and agent; it is a case of agency as to a specific matter, the acceptance of bills of exchange. No agency has been proved here. There certainly is not what may be called the agency of partnership. The Smiths continue owners of the property, and it is only by virtue of authority from them that the trustees carried on the business. *Waugh* v. *Carver*[2] cannot, perhaps, be disputed, but the reasoning there is not satisfactory, and it has not been adopted by Story or Collyer.

Owen v. *Body*[3] has no application here: it merely shows * 274 that certain * creditors who had not executed a deed were not bound to execute it, as it contained stipulations which might, not which did, constitute the persons who signed the deed partners in a trade concern. Such was the explanation of it given by Mr. Justice Maule in *Janes* v. *Whitbread*.[4] And in that case itself the distinction was clearly taken between a deed intended to wind up a business for the benefit of creditors, and one the object of which is to carry it on with a view to future profits.

In *Young* v. *Axtell*,[5] the receipt of 2*s*. per ton on coals sold to persons recommended by the defendant, in addition to an annuity out of the business, would not have made the defendant a partner, had it not been for other conduct, which amounted to holding herself out to the world as such. Here there was nothing of that sort. And *Bloxham* v. *Pell*[6] was decided by Lord Mansfield on facts which satisfied his mind that the whole business was "a mere device to make more than legal interest of money, and if it was

[1] Vol. 1, p. 34. [2] 2 H. Bl. 235. [3] 5 A. & E. 28.
[4] 20 Law J., N. S., C. P. 220, 11 C. B. 406.
[5] Cited in Waugh *v.* Carver, 2 H. Bl. 242.
[6] Cited in Grace *v.* Smith, 2 W. Bl. 999.

not a partnership it was a crime." There is no such device here, the sole object being to secure payment of an existing debt. It lies on the plaintiff to show that the defendant has done that which constitutes him a partner, and the plaintiff has not given any evidence establishing such a case.

Mr. Rolt (*Mr. Field* was with him) for the respondent in both cases. — First, here was a contract of co-partnership under which the business was to be carried on for the benefit of creditors; secondly, the scheduled creditors are entitled to participate in the profits, and must, therefore, be considered partners; and, thirdly, any one partner, or the general * agent of the partners, * 275 may bind all the others by the acceptance of bills in the regular and necessary course of business. The first of these matters is one of fact. The business was carried on by creditors who were made trustees for the benefit of the other creditors. The general powers of management given to the trustees show this. These powers would have been unnecessary if the trustees had been the only persons concerned in carrying on the business. Then comes in the deed what is equivalent to a release of the debts due from the Smiths. Suppose this had been an arrangement between three individuals only to carry on the business till A. had received 1,000*l.*, and B. 500*l.*, and C. 250*l.*, and, as soon as they had been satisfied, then to pay the surplus to D., there can be no doubt that that would have been a partnership between A., B., and C. So it is here. The creditors have intervened at meetings, and determined what should and what should not be done, just as any private individuals would do in a partnership. The creditors have the powers of ownership, and they have also the power to inspect the books, which was considered a material ingredient in *Bloxham* v. *Pell.* An agreement for a man to have a share in the profits of a business till a debt is paid makes that man a partner. The nature of the agreement between two parties themselves, if the profits are really rendered liable to both, cannot affect third persons as to whom they will be liable as partners; *Bond* v. *Pittard.*[1] In that case, *Gilpin* v. *Enderbey*[2] was referred to. That was a case where the contrivance seemed to

[1] 3 M. & W. 357. [2] 5 B. & Ald. 954.

have been to evade the usury laws, but as the party received his income out of the profits, it was treated as a partnership. * 276 So, in *Barry* v. *Nesham*,[1] though all * that one of the parties was to receive appeared to be a charge upon the profits, yet, as his interest varied with this amount, he was held to be a partner. *Bloxham* v. *Pell*[2] is a strong authority for the respondent. And in *Wightman* v. *Townroe*,[3] executors of a deceased partner, who continued his share of the partnership property in trade for the benefit of his infant daughter, were held liable on a bill drawn for the accommodation of the partnership upon the general principle of partnership liability, and not through any proof of particular agency, such as has been contended in this case to be necessary.

Any specific participation in the profits creates a partnership; *Ex parte Hamper*.[4] Unless this judgment is supported, the case of *Owen* v. *Body*[5] must be overruled. It is directly in point. There, as here, was an assignment for the benefit of creditors; the trustees were to carry on the business of the debtor, to pay 2*s*. in the pound when requested by the creditors, and to pay the surplus to the debtor; and the creditors covenanted not to sue Marchetti for their debts then due. The Court held that the creditors who did not execute the deed were not bound because it contained stipulations which might constitute a partnership. They are the same stipulations which exist here, and here, therefore, they do constitute a partnership. *Janes* v. *Whitbread*[6] is equally decisive for the respondent, the exception introduced there being, that the scope of the deed was not to carry on the business, but to effect a sale and distribution of the effects. Here the scope of the * 277 deed was to carry on the business for the * benefit of the creditors. In *M'Alpine* v. *Mangnall*,[7] the terms of the deed were very different from the present, and the only real question was, whether the assignment was a violation of the patent law.

It is not the right to share profits indefinitely, but the right to share profits, that constitutes a partnership; and the only exception to that is, the contract to pay a servant a salary which is to be

[1] 3 C. B. 641.
[2] Cited in Grace *v.* Smith, 2 W. Bl. 999.
[3] 1 Maule & S. 412. See Labouchere *v.* Tupper, 11 Moore, P. C. 198.
[4] 17 Ves. 403.
[5] 5 A. & E. 28.
[6] 11 C. B. 406.
[7] 3 C. B. 496.

ascertained by the amount of the profits. [LORD BROUGHAM. — Yet authors and publishers share the profits of a work without a partnership being established. LORD WENSLEYDALE. — Is not that because the publisher agrees to bear the whole charge, and after being remunerated for that, to divide the net profits ?]

No doubt this is a branch of the law of principal and agent, but it is not by that law that the question is to be determined whether a partnership exists. It is said on the other side, that the appellants did not give authority to accept the bills, but that depends not on the authority which, as principals, they might give to an agent, but on the character and liabilities which they took on themselves in entering on this business. The bills were accepted by Haywood, who was at once their partner and their agent in carrying on this business. *The South Carolina Bank* v. *Case*[1] established that the acceptance of bills in the name of a firm in the regular course of business by the manager of the business, or by a partner, will bind the firm. That case must be applied here.

Mr. Welsby replied.

THE LORD CHANCELLOR (LORD CAMPBELL) proposed the following question for the Judges. — "Are the defendants in * this case liable as acceptors of the bills of exchange * 278 declared upon ?" — Agreed to.

MR. JUSTICE BLACKBURN. — The defendants in this case are liable as acceptors of the bills of exchange declared upon. The question entirely depends on the effect of the deed of arrangement. If the effect of that deed is such that creditors executing it thereby give authority, to those managing the Stanton Iron Company, to bind them to third persons in the usual course of business by accepting bills, the defendants have given such authority. If the effect of the deed is not such that creditors executing that deed give authority to bind them as to third persons, the defendants are not shown to have given any such authority, for they have never acted as trustees ; nor does it appear that they have done any act beyond what was proper to carry out the arrangement contained in that deed.

The principal object of the deed of arrangement is to divide the

[1] 8 B. & C. 427.

property of the Smiths amongst the creditors according to the rules observed in bankruptcy; and for this purpose their property is assigned to trustees. The goodwill of the business which had been carried on by the Smiths was part of their joint estate, and those who had the making of the arrangement appear to have thought it a valuable part of the joint estate. Instead of disposing of it to third persons, or suffering it to be lost, the arrangement made was, that the business should in future be carried on under a new style, that of "the Stanton Iron Company," by the trustees, in the manner stipulated for in the deed to which the creditors are parties. The question is, whether the stipulations are such as to render those creditors who are parties to the deed partners
* 279 in the Stanton Iron Company, * so far, at least, as regards liability to third persons.

Some of the Judges in the Court below have expressed an opinion that there is a distinction between the present question and that which would have arisen if the question had been whether the defendants were liable for the consideration of these bills. I am, however, of opinion that no such distinction exists. I apprehend that all cases as to liability of partners to contracts are branches of the law of agency, and that the question always is, whether the contract entered into is within the scope of the authority conferred by those, who are sought to be charged, upon the person actually making the contract. But I take it that, as matter of law, those who are partners in a trading firm, do confer upon those who are permitted to manage the concern, authority to make all contracts which in the exigency of the business are necessary and proper and customary. This *primâ facie* authority may be restricted by express agreement, but unless those who deal with the firm have notice of this restriction, they are entitled to hold all who are partners bound by the *primâ facie* authority conferred on the manager, and that equally whether the persons sought to be charged were persons to whom the creditors gave credit, or dormant partners, of whose existence they were unaware. I think the justice of this rule, as applicable to dormant partners, very questionable, but I do not think it open to question that it is the rule of law. I think that where, as in the present case, the accepting of bills is a necessary and customary part of the business, the authority to accept them is conferred as much as the authority to contract the debts for which they are given. It is true the authority is limited to

accepting bills in the name of the firm, and binds only those included in that firm, but all who are partners are included in the firm.

* I think, therefore, as already said, that the question is, * 280 whether the stipulations in the deed are such as to constitute a partnership *quoad* third persons, and to determine that question we must look to the terms of the deed. The material stipulations, as it seems to me, are the following: the trustees are, as soon as possible, to convert into money such parts of the joint property of the two Smiths as shall not be necessary to carry on the said business (that excepted property not to exceed 4,000*l.*); they are to carry on the business under the name of the Stanton Iron Company, for which purpose they are clothed with all the powers proper to be confided to the managers of such a concern. It is agreed that, after paying all the expenses and losses to be incurred or sustained in carrying out the business, they shall pay and divide the net income of the said business, remaining after answering the purposes aforesaid, into and among the creditors of the Smiths, in ratable proportions according to the amount of their respective debts, subject to the provisions thereinafter contained. The deed then provides that the trustees at any time may, and on the requisition of joint creditors whose debts together amount to 3,000*l.* must, call a meeting of the creditors, and that the decision of the majority of such meeting shall have full power for the general benefit of the creditors to give any directions for the discontinuance of the business, or "for the present or future management thereof," which shall be binding on all the creditors whether concurring or not. The Smiths have no vote in determining how the business is to be managed, and the trustees are absolutely bound to obey the directions of the meeting of creditors. If the concern is wound up, the clear residue of the monies, after paying all expenses, shall be divided among the creditors of the Smiths ratably as joint property. It is provided that where the debts of the *several creditors are paid in full the trustees shall * 281 make over the property for the benefit of the Smiths, and this clause is to be noticed as being the only clause in which the trusts are for the benefit of the Smiths, except so far as they are benefited by the liquidation of their debts. And it is to be noticed that, from its nature, it can only come into operation when the trade of the Stanton Iron Company ceases. It is provided

amongst other things that every creditor shall have a right at all times to inspect the books of the firm. No such power of inspection is given to the Smiths. Then follows a provision for the trustees, "by and with the consent of the majority of creditors in value, attending any meeting of creditors," to appoint fresh trustees in the room of those retiring. The Smiths have no voice in this. Then follows an agreement that all creditors executing or becoming otherwise bound by the deed should accept its provisions in full satisfaction of their claims upon the Smiths, and that in case any of them sue for their debts that this deed may be pleaded as a release.

These, I think, are the whole of the material parts of the deed. There is no stipulation in the deed, as to who is to provide for payment of the partnership liabilities in case the losses should be so great, as to exceed the sum of 4000*l.*, which the trustees were authorised to retain for the purpose of carrying on the business. The parties seem not to have anticipated, or at all events not to have provided for such a contingency, which, though a probable one, is often overlooked by those entering on a trade, but the rule of law is clear enough, that those who are partners in the concern must bear such liabilities; so that I once more repeat, the question comes round to whether the stipulations are such as to constitute a partnership amongst the creditors.

Now, on looking at the provisions of the deed, it seems * 282 * to me that they are, in substance, such as would be proper if the creditors constituted themselves a joint-stock company, such as it would have been at common law, and made the trustees their managing directors, but agreed that the partnership should cease as soon as a certain sum, in this case the amount of their debts, was realized. I find that the business is to be carried on by the trustees under the control of the creditors, who may give what directions they think fit as to the management of the business; that the creditors are to have a voice in nominating fresh trustees in case they are changed; and that the creditors are to have a right to inspect the books. And, moreover, I find that the creditors alone are to have these powers, no similar powers being given to the Smiths. Then I find also that the trustees are bound to pay over the net income, after paying all expenses of the concern, ratably among the creditors. It was suggested at your Lordships' bar, that there was some distinction

between the net income, after paying all out-goings, and the net profits, but I am unable to understand what that distinction is.

The arrangement is that the trading might terminate on the creditors being paid, which perhaps was the termination which the persons entering into the arrangement hoped for. In that case, the deed provides that the property shall be made over to the Smiths, but by so doing the trade of the Stanton Iron Company ceases. Whoever the partners in that firm might be, they are no longer to carry on the business after the property is assigned to the Smiths. It might terminate by the concern being stopped by the creditors whilst it was yet solvent; that event is anticipated by the deed, and in that case it is provided that the surplus, after paying all losses, should be divided amongst the creditors. It might continue for an indefinite period, neither so productive as to pay the creditors in full, nor so * bad as to be stopped; and whilst * 283 it was so continued, the creditors were to have the net income or profits, and the control of the management of the concern, and they were only to have these powers. Does this make them interested in the property or profits, so as to make them partners? That question depends on the effect of the deed, and it will be answered when we have determined the extent of their interest in the property of the firm. Suppose, a not impossible case, that the trustees had, as individuals, contracted a joint debt for some purpose unconnected with the Stanton Iron Company: could the partnership property of the Stanton Iron Company have been taken to pay the debt? Or, if the trustees had become reduced to one person, and he had become a bankrupt, would the assets of the Stanton Iron Company have passed to his assignees? Or would the creditors, who were parties to the deed of arrangement, have been entitled in either case to say that the property was in equity theirs, and that the trustees, except in so far as they were creditors, had no beneficial interest in it? That is a question that depends on the construction of the deed. I think the construction of the deed is such, that the creditors, parties to the deed, have bargained that they shall have a hold over the whole property of the firm, divided or undivided, and I think this bargain is effectual, and, if so, that the creditors do take the profits of the concern, so as to make them their property before they are divided.

The deed does not provide what is to be done in the case which has actually happened, viz., that of the concern proving insolvent;

but the law declares that those who take the profits of a trading concern as such are liable to the losses, even if they have stipulated to the contrary. *Waugh* v. *Carver*,[1] and the notes thereto.

* 284 * The phrase, taking the profits as such, is not a happy one, and there is some difficulty at times in defining what it means, but I think it at all events means this: it is not possible, according to the common law, to cause a trading concern to be carried on, on the terms that the advantages of a partnership, including the participation in profits, and the partnership lien and security over the assets of the firm, shall belong to those who have but a limited liability. I am aware of no case or authority inconsistent with the proposition thus guarded. Now, it seems to me, that the present defendants have, by the deed to which they are parties, stipulated that the business shall be carried on for their benefit, and under their control; that they shall be interested in all the property of the firm to such an extent as to have a partnership lien upon it. This shows that they are not merely persons permitting the Smiths or the trustees to carry on the business, and relying on it as a fund for payment, but that they take the profits as such, and having done so, they are partners as regards third persons. I agree that the question is one of agency, viz., whether the defendants authorised the managers of this firm to bind them; but I think it is an incident attached by law to a participation in the profits to the above extent, that such authority is given to those managing the concern. I think, for the reasons I have given, that this arrangement deed does amount to a stipulation for a participation in the profits as such by the creditors.

For these reasons, I am of opinion that the defendants are liable as acceptors of the bills of exchange declared upon.

Mr. Baron Channell. — It appears to me, that both defendants stand on the same footing; that both defendants are liable upon the bills, or neither. Cox never acted as trustee. Wheat-
* 285 croft * acted for a short time, but resigned his trust according to the provisions of the deed before the goods were supplied, the price of which is sought to be recovered.

I do not rely altogether upon the distinction taken by those of

[1] Smith's Lead. Cas. 786.

the Judges of Court below, with whose judgments otherwise, and in the result, I agree; that is to say, on the distinction between an action on these bills, and one for goods sold and delivered.

If the deed does not constitute the defendants partners in the business carried on under the name of the Stanton Iron Company, upon which the bills are drawn, the defendants are not liable on the bills; if the deed did constitute them partners in the business so carried on, they would be liable, both on the bills, and for the consideration of them. Their liability appears to me to depend entirely on the deed, for I see nothing done by them at the meetings which they attended, which can create a liability, if the deed does not.

That deed contains no authority, I think, to pledge the credit of the defendants; but it is said, that by executing the deed, the defendants became partners as regards third persons, by reason of the interest they take in the net profits, and that the business carried on under the deed was the business of the defendants and the other creditors of the third part.

The provisions of the deed are carefully analysed and sufficiently set forth in the judgment of the Master of the Rolls, which is with the papers before your Lordships; I refer to that judgment for the provisions of the deed. I think that no new trade or concern was carried on. It seems to me, that it was the old concern, though carried on under the management of trustees, and under a new name; that it was to be carried on by parties in whom the Smiths on the one hand, and the general body of creditors on the * other hand, placed confidence, that is to say, by the trus- * 286 tees; but that it was the business of the Smiths; that the creditors who had rights against the Smiths, which they might have enforced by legal proceedings, in effect, in consideration of the arrangement that the trade for the future should be carried on by the trustees, and not under the management of the Smiths, agreed to forego their ordinary rights, as creditors, against their debtors, and to receive a sum equivalent to what was the amount of their debts, when the net profits (that is, as I understand, profits made after satisfying all new debts) should enable the trustees to pay the parties of the third part such equivalent sum.

The business was, I think, the business of the Smiths, carried on with a view to their ultimate benefit; and the fact, that the creditors had power to put an end to the management by the trus-

tees, and to discontinue the business, and to require the property, the capital, to be sold and divided amongst them in satisfaction or part satisfaction of monies, which, according to my understanding of the deed, and by virtue of the deed of arrangement, became a charge on the property of Messrs. Smith, does not vary the case so as to constitute the creditors of the third part partners in the business. The creditors of the third part had no power, I think, by virtue of the deed to take upon themselves the management of the business.

Supposing that I am wrong in considering the business carried on under the deed as the old business under a new name, and that the business is to be considered a new business, I think the creditors, parties to the deed of the third part, may be likened to parties who had made loans to the new partnership to the extent of their debts against the old concern, and that by stipulating to receive payment of their loans out of the net profits, the amount to be received not varying with the rate of the net profits so as * 287 * to give them any interest beyond the amount of their loan, they did not render themselves partners. That was the view taken by his Honour the Master of the Rolls with reference to this deed. No doubt his judgment is to be considered as only deciding that this deed did not constitute a partnership within the meaning of the Winding-up Acts. But the whole reasoning goes to show that in the opinion of that learned Judge there was no partnership created by the deed; and I adopt that view.

Cases were cited in the argument which appear to me to establish more or less clearly and satisfactorily certain principles of partnership law, which do not apply to or govern this case, and it is not, in my view of the case, necessary to go into those authorities; but as to *Owen* v. *Body*,[1] I may say that I think that case only decided that, where there was fair ground for contending that a certain proposed arrangement might amount to a partnership, a creditor might fairly object to execute the deed, and, so objecting, it was invalid against him, a non-executing creditor. See the observations of Mr. Justice Maule in *Janes* v. *Whitbread*.[2]

Upon the whole I think that an agreement by a debtor with his creditors, to apply net profits (if any) in payment of old debts, and on the part of the creditors to give up their rights to be paid

[1] 5 A. & E. 28. [2] 20 Law J., N. S., C. P. 220.

out of the capital, taking their chance of being paid out of the net profits which may be made after payment of new debts, does not create, as regards third persons, a partnership, such third persons not knowing of the arrangement, and not having trusted the creditors, and the creditors not having held themselves out to such third persons as parties liable.

I therefore humbly answer your Lordships' question in the negative.

*Mr. Justice Crompton. — My Lords, I take the same *288 view of the effect of the deed in this case that was taken of it by my brother Coleridge in the Court of Exchequer Chamber, and I quite agree in the reasons he there gave for our judgment.

It seems to me that the old concern of the insolvents, Messrs. Smiths, being put an end to, the creditors, by the deed in question, came to an agreement amongst themselves that the business should be carried on by their agents under a new firm, for their benefit. Whilst such business was so carried on, and until the amount of the debts was paid off, or until they should choose to discontinue the business, the net income of the business was, by the express words of the deed, to be "divided amongst the joint creditors in ratable proportions according to the amount of their respective debts."

I cannot doubt that an arrangement so to carry on a business, with such a participation of profits, renders the parties liable as partners to persons furnishing goods or giving credit, according to the course of trade, to the firm.

The question, therefore, seems to be, whether the defendants in error were right in the construction they put on this deed. The plaintiffs in error contended that the real effect was, that the trustees were trustees for the Smiths, that the property was to be theirs, and that it was their assent only which invested the trustees with their trust. But the Smiths were to have no management or control in the new concern; they were not to be summoned to any meetings or to have any right to interfere in the slightest degree with the management of the concern, or with the disposal of the property, or with the duration of the trade. If by any chance the amount of the twenty shillings in the pound should be ever realised, they might take the trade *and any capital left to *289 themselves, but the trustees were not to carry on the busi-

ness for them. It seems strange to say that they were interested in the profits to arise whilst the business was being carried on under the deed, none of which profits they were to touch, but which were to go in discharge of debts to which they were no longer liable. They had in effect sold the business with its capital for so long a time as the creditors chose to carry it on for their own benefit, or until the amount of their abandoned debts should be realised. The creditors preferred to have the profits of the trade during the duration of the new business to having the property which would have been distributable amongst them under a bankruptcy; and in effect they purchased the business for the limited time, each creditor giving up so much of his right to a share in the property, and by the deed his share of profits being proportioned to the amount of his abandoned debt. "The new provisions," that is, the payment from the profits, are expressly declared "to be a satisfaction," and the formal words of immediate release are not included merely from fear of some technical difficulty as to collateral remedies; but as between the Smiths and the individual creditors the debts are entirely destroyed.

For whom then are the trusts as to the profits whilst the business lasts? Surely not for the Smiths, who can have nothing out of the business of the firm in question, whilst carried on by the trustees. Their assent was necessary, and the bargain was a good one probably for them, but they really have no more to do with the business than a solvent firm whose business is purchased, as put by my brother Coleridge.

It need not be discussed whether the Smiths might be made liable as partners by reason of their very remote interest
* 290 in getting back the business for themselves after * payment of the twenty shillings in the pound. That business, if ever they were to get it, was not, however, a business to be carried on under the deed, for there is no trust for carrying on the business when their time arrives. The trust is only to carry it on whilst the creditors are interested, and choose to have it continued. It is difficult, to my mind, to see that the Smiths can be termed participators in the profits, as they take nothing from the fund to which the new creditors of the firm may look.

Stress was laid upon the provisions of the deed wherein it is said that the monies are to be deemed the property of the two Smiths. When looked at, however, this provision points only to the

joint and not the separate property, and regulates the distribution amongst the joint creditors. And even if that were not so, such a provision could not alter the real nature of the transaction, according to which the property was by a binding deed to be traded with for the benefit of the creditors, and might be entirely lost or disposed of by them, and could not be withdrawn or touched by the Smiths so long as the creditors choose to carry on the business for their own benefit; and the only interest of the Smiths was in the somewhat remote contingency of the payment of the twenty shillings in the pound.

It cannot alter the question that the legal property was vested in trustees for the creditors. The creditors had the equitable property and the full control over it vested in them, whilst the partnership lasted, and the trustees, as trustees, had no beneficial property whatsoever, and it can be of no consequence that the legal property in the capital of a concern is vested, for convenience, in trustees or managers.

But it is said that the trustees are the persons really liable. If they are liable, they must be liable as holding themselves out to the world, as it is called, as the real contractors.

* As creditors, two of them are in the same position as the * 291 rest of the creditors, but taking them to be trustees merely, they could only be liable as the ostensible partners, as they really have no interest as trustees. They seem to me, however, as between them and the creditors, to be the mere agents of the creditors. The creditors have the most entire control of the whole concern. They are expressly empowered to give any "orders or directions for the present or future management;" they are to direct the continuance or putting an end to the business, and to make any composition as to debts and as to the property; and they are the only persons to whom the managers can look for funds in the event of the property left in the concern being lost or insufficient. These managers seem to me not to differ in any respect from the managers of a joint-stock company. Suppose such a company to have started before the Joint-Stock Companies Act, and to have gone on at common law, there must have been the same arrangements as here for meetings when the number was too large for each partner or member to act individually, and they must have had managers to act for them, in whom the legal property might probably be vested for convenience. Though

called trustees in the deed, the persons so entrusted were really managers, and as far as the management of the concern went, the mere agents of the creditors, who had the entire control over them.

In what then does the present case differ from that of ten persons setting up a new business in the names of two or three managers, they having to divide all the profits? The present case, indeed, is not even one of a trading in the names of the managers, but in a name which may comprehend any partners, and the clause of the deed so much relied on by the plaintiffs in error, which stipulates that they shall carry it on in the name of the Stanton Iron
* 292 * Company, must surely be quite inoperative as to any limitation of the liability to such persons when the rule of law is so well recognised, that no agreement amongst partners can prevent the liability to third persons arising from the participation of profits. I can see no hardship, under this particular deed, in the creditors, who are to have the profits, being liable for the funds and goods from which the profits are to be made, except the general hardship of large liability from small investments, attempted to be remedied by the Limited Liability Acts.

The only authority at all at variance with the liability of the creditors, seems to be that of *McAlpine* v. *Mangnall*, in which case, however, the point did not arise, and does not seem to have been very fully discussed, and in which it seems very probable that the deed was one, according to which Bridson was himself to carry on the trade under inspection. On the other hand, *Body* v. *Owen*, and the recognition of that case in the Court of Common Pleas in *Janes* v. *Whitbread*, with the very decided approbation of Mr. Justice Maule in that case of the doctrine as explained by him, are in favor of the plaintiffs below.

I cannot think that the limit of the amount which the parties are ultimately to receive, or the limited length of time during which the partnership may be carried on, or the object being to get more in payment of the debts than they would otherwise have done, or the fact that the debts might be paid, and the interest in the profits of any one or more of the creditors might cease, can at all lessen the liability of the creditors. It seems to me, that whilst the business is carried on for their profit, under their control, they are liable for the debts of the concern upon very well-settled principles of law, which I think it would be dangerous to interfere with, except by an Act of the Legislature.

*For these reasons I answer your Lordships' question * 293
in the affirmative.

MR. JUSTICE WILLIAMS. — My Lords, I am of opinion that the defendants in this case are liable, as acceptors of the bills of exchange.

The consideration of the case divides itself into two inquiries: First, did the creditors who executed the trust deed become partners in the business carried on by the trustees under the provisions of the deed? Secondly, if they did so, are they liable as acceptors of the bills on which these actions are brought?

The first question plainly depends on the construction of the trust deed. On the part of the plaintiff it was argued that the trust is for the benefit of the creditors; that the business is to be carried on solely for their benefit until their debts shall have been paid; and that the trustees are to carry it on under the authority of the creditors, as their agents. On the part of the defendants it was argued that the trust was rather for the benefit of the Smiths, the debtors, to enable them better to realise the assets to pay the creditors in full, and to obtain a surplus for themselves. And farther, that the authority conferred on the trustees by the deed to deal with the plant and other property necessary for the conduct of the business, and also to carry on the business itself according to the provisions of the deed, is conferred on them by the Smiths, and not by the creditors, so that the trustees ought to be regarded as agents for the Smiths, and not for the creditors.

But I am of opinion that these latter arguments are not well founded. It appears to me that the true construction of the deed is, that the creditors, in effect, buy the good-will of the business, and the means for carrying it on for their own benefit until
enough shall have been earned to pay *their debts in full, * 294
at the price of consenting to accept the provisions of the deed in full satisfaction of their claims against the Smiths, and of entering into the covenant not to sue them in respect thereof. The business is then to be carried on, not under the old firm of "Benjamin Smith and son," but under the new firm of "The Stanton Iron Company." The profits are to be appropriated exclusively to the payment of the debts of the creditors until they are paid off; and the trustees are placed under the control of the general body of creditors, who may, at their pleasure, alter, add to, or diminish

the powers, trusts, and provisions of the deed, and may (in effect) appoint new trustees, and may direct that the works shall be discontinued; and, in such case, the trustees are to wind up the business, and, after paying all the expenses and liabilities, divide the clear residue amongst the creditors ratably, in proportion to their respective debts. The effect of all these provisions appears to me to be, that the creditors, having, by the sacrifice of their claims on the Smiths, acquired the means of carrying on a trade for their own benefit, arrange the mode of doing so by constituting a certain number of themselves managers of the concern, under the name of trustees, who are to carry it on, subject to the control of their general body. If this be the true construction of the deed, I do not see how it can be doubted that the business carried on under its provisions is, in effect, carried on by all the creditors as partners.

It remains to consider whether, supposing they were thus constituted partners, it follows that they are liable as acceptors of the bills. I have already had occasion to express my opinion that the business carried on under the provisions of the trust deed must be regarded as in effect carried on by the trustees as managing partners for the general body of the creditors, under the firm * 295 of "The * Stanton Iron Company." And if this be so, it seems necessarily to follow that, as against those with whom they deal, the creditors are to be deemed the company, and each creditor must be liable on the acceptances in question, inasmuch as they were accepted by one of such managing partners, in the name of the firm, for iron ore previously delivered to the company by the plaintiff for the purposes of the works, it being the usual practice to give such bills for ore so supplied.

For these reasons I have to answer your Lordships' question in the affirmative.

Mr. Justice Wightman, after stating the pleadings, the provisions of the deed, and the facts of the case, said. — The question is, whether the creditors are by the execution of the deed partners with the trustees, and *inter se*, in carrying on the business, or rather whether the creditors who executed the deed are not the real partners carrying on the business, and the trustees merely their agents, and not principals or partners, except as far as they are creditors executing the deed.

The bills are drawn upon the Stanton Iron Company, and accepted by Haywood, by procuration of the company. By the terms of the deed, the trustees are the persons who carry on the business under that name, and all the stock in trade and property of the concern would be vested in them, or it would be impossible for them to execute the trust. The iron, which was the consideration for the bills, would be part of the trust property vested in the trustees; but if they did not happen to be creditors, or had ceased to be creditors, they would, according to the argument for the respondent, be merely the agents for the creditors, who are the persons really carrying on the business, and so not liable at all. Suppose that the trustees had not * been creditors, * 296 and had accepted the bills in their own names, stating themselves to be the Stanton Iron Company, would the creditors have been liable upon that acceptance? I should think not; and that the trustees could not be considered as mere agents for the creditors.

It is said that a person who shares in net profits is a partner; that may be so in some cases, but not in all; and it may be material to consider in what sense the words, "sharing in the profits," are used. In the present case, I greatly doubt whether the creditor, who merely obtains payment of a debt incurred in the business by being paid the exact amount of his debt, and no more, out of the profits of the business, can be said to share the profits. If, in the present case, the property of the Smiths had been assigned to the trustees to carry on the business, and divide the net profits, not amongst those creditors who signed the deed, but amongst all the creditors, until their debts were paid, would a creditor, by receiving from time to time a ratable proportion out of the net profits, become a partner? I should think not. In the present case, neither of the plaintiffs in error, as an individual creditor, has any power or control over the trustees, and the relation of principal and agent can hardly exist between them.

The cases of *Owen* v. *Body*,[1] and *Janes* v. *Whitbread*,[2] can scarcely be considered decisions which would govern the present case, for the reasons given by the Judges in the Court below, whose opinions were in favour of the appellants; and the case of

[1] 5 A. & E. 28.
[2] 11 C. B. 406; 20 Law J., N. S., C. P. 217.

Bond v. *Pittard*,[1] which was much relied upon by Mr. Rolt for the respondent, is clearly distinguishable, for in that case the two brothers, Watts, were admitted by themselves, and held
* 297 * out to the world as partners; and the only question was, how far their private agreement as to profit and loss would affect their rights or liabilities as general partners.

It appears to me that, in the present case, the legal rights and liabilities, in respect of the business carried on under the name of the Stanton Iron Company, are in the trustees, and that at all events the creditors are not liable upon bills drawn and accepted in such a manner as those in question; and that the procuration under which Haywood accepted the bills, is not the procuration of the appellants, or of the creditors, but of the trustees; and that the appellants are not liable as acceptors of the bill. And I may farther add, that I agree generally in the opinions expressed by those of the Judges in the Court below who were in favour of the appellant, and particularly in that expressed by my brother Martin.

I therefore answer your Lordships' question in the negative.

Lord Chief Baron Pollock. — My Lords, the question in this case is, whether the defendants below are liable on the bills which are the foundation of the action.

There is, I think, no distinction between one defendant in error and the other; on the contract both are liable or neither; and I own I do not see that any distinction can be drawn between this action on the bills, and an action on the consideration for which they were given. I think the defendants below are liable in this action, if they would have been liable in an action for the goods supplied.

If the defendants below are liable, it must be by virtue of the deed to which they became parties; no other ground can be suggested.

On the part of the plaintiffs in error it was contended, that
* 298 there was nothing in the * deed that authorised the trustees to pledge the credit of the parties to the deed of the third part; and on examining the deed to ascertain this, no such direct authority can be found. But it is contended for the defendants in error, that by virtue of the provisions in the deed, the creditors be-

[1] 3 M. & W. 357.

came partners, and therefore that they are liable, whether their credit was pledged or not, and whether there was any express authority to pledge it or not; and I think it must be admitted that the conclusion is just if the premises are true. And the question then arises, whether the interest which the creditors had in the profits to be made by the carrying on of the business under the deed, was such as to make them partners in respect to third persons; in order to examine this, let me put this case: If a firm was in difficulties, and a person proposed to assist by a loan of money, engaging to receive payment out of the profits only, and to make no claim in the event of there being no profits, but stipulating that one-half of the profits should be applied as they rose in payment of his debt, and that he should have power to see that this was done, would he thereby become a partner, and liable to all debts contracted subsequently to this arrangement? On this very simple state of facts there may possibly arise a difference of opinion, but I think a large majority of all lawyers and of all commercial men would decide at once that assistance so offered and so accepted would not make the lender of the money a partner to third persons. If he took a warrant of attorney, entitling him to enter up judgment at his pleasure, and sweep away, in payment of his demand, capital, debts, profits, and every thing, he certainly would not be a partner; but it is said, if he limits his claim to be paid out of profits only, his limited right to payment creates an unlimited liability. I think, my Lords, there must be some fallacy in this: the conclusion, to my mind, appears * to be so unjust and absurd, and so much at vari- * 299 ance with natural equity.

The case before your Lordships may, no doubt, be put as being stronger in favour of a partnership than the case I have supposed; and I think it may be conceded to Mr. Rolt's argument in favour of the defendants in error, that if his version of the transaction be the correct one, his conclusion is right; if the trustees be merely managers, on behalf of the creditors, of a new concern, and the business be carried on under their direction and for their entire benefit, it would be difficult to say that the conclusion would be wrong that asserted their liability to debts incurred.

I observed that the learned counsel more than once referred to what he expected a jury would decide by the verdict as the conclusion to be drawn from the facts of the case. But the office of a

jury is to decide between conflicting testimony, and not to arrive at conclusions of law from acknowledged facts. When no fact is in dispute (as is the case here), the Courts of law generally decide for themselves what is the resulting legal conclusion, and do not speculate on what a jury would find.

The effect of the deed appears to me to continue the old concern, rather than to create a new one, but to put it under the management of the trustees, who are a sort of guarantors or securities that the real contract shall be carried into effect; who are to protect the interests of Messrs. Smith on the one hand, from whom all their authority emanates, and of the creditors on the other, so that the creditors who give up their claim on the capital, provided they are paid out of the profits, shall have the profits so applied, if there be any. The debts of the creditors are not extinguished altogether, for if the concern is unprofitable, the * 300 creditors may require it to be given up, and the * property to be sold and divided among them. The trustees act under a power of attorney from Messrs. Smith, and they are to continue to carry on the same business and pay all rents and charges, but they are to apply the net income (of course, after satisfying all new creditors) in payment of the claims of the old creditors. The creditors have power to call meetings, and direct that the business shall be discontinued and the property sold and divided ratably among the creditors; they have also power to make rules, orders, and directions; but, as I construe the deed, they have no power to interfere and take the management into their own hands, if the business is discontinued; all the effects are to be sold, all expenses are to be paid, all the debts, &c., of the trustees are to be discharged, and the clear residue is to be divided among all the creditors as the joint property of Messrs. Smith; provision is made for an allowance for the support of Messrs. Smith and their families.

The deed, when examined, appears to me not to justify the account of it given by Mr. Rolt; and the question remains, does the interest in the clear profits, such as it is, constitute a partnership according to the law of England? I shall very shortly advert to the cases cited.

In *Owen* v. *Body*,[1] the judgment is very short, and amounts

[1] 5 A. & E. 28.

merely to this, that the possibility that the arrangement might be deemed a partnership was a sufficient ground for the creditors to decline executing the deed, and therefore it was invalid; and the case is so explained by Mr. Justice Maule, in *Janes* v. *Whitbread*.[1] But neither the one case nor the other decides that such a deed would constitute partnership as to third persons, any more than the case before the Master of the Rolls decides that * such a deed would not constitute a partnership as to third * 301 persons. The cases of remuneration to managers, agents, servants, or factors, may be dismissed at once, as having no application to the present; and there is really no direct authority upon the point either way.

There is a passage in "Story on Partnership,"[2] to which I wish to refer your Lordships, as clearly expressing the views I entertain: "In short, the true rule *ex æquo et bono* would seem to be, that the agreement and intention of the parties themselves should govern all the cases, if they intended a partnership in the capital stock, or in the profits, or in both; then, that the same rule should apply in favour of third persons, even if the agreement were unknown to them; and on the other hand, if no such partnership were intended between the parties, then that there should be none as to third parties, unless where the parties had held themselves out as partners to the public, or their conduct operated as a fraud or deceit upon third persons."

Taking this view of what the law is, it seems to me, that this arrangement, to apply future profits (if any) in payment of the old debts, the creditors being willing to give up their right to be paid out of the capital, and to take the chance of any profits, appears to me not to constitute a partnership as to third persons who know nothing of the deed, and who have not trusted the creditors; and therefore the defendants below are not, in my opinion, liable as acceptors of the bills of exchange declared upon.

August 3.

THE LORD CHANCELLOR (LORD CAMPBELL).—The only question in these cases is, whether the defendants by executing the deed of 13th November, 1849, as * creditors of Messrs. * 302 Smith & Co., rendered themselves liable to the creditors

[1] 20 Law J., N. S., C. P. 217.

[2] Ch. 4, § 49.

who should afterwards deal with the trustees appointed by this deed to carry on the concern of Messrs. Smith & Co., under the new firm of "The Stanton Iron Company." The plaintiff alleges that although the defendants never acted or held themselves out as partners in this new firm, and the creditors of this new firm, unaware of the deed, have dealt only with the trustees, the creditors of the new firm are entitled to sue the creditors of the old firm as partners in the new firm.

It is quite clear that the creditors of the old firm, by executing the deed, never intended to incur such a liability, and I think that the creditors of the new firm cannot be supposed to have dealt with this firm in the belief that they could have a remedy against all or any of the creditors of the old firm.

Is there here such a participation in the profits of the new firm by the creditors of the old firm, as to make them partners in the new firm? They certainly are not partners, *inter se*, as was properly held by the Master of the Rolls,[1] and they could derive no profit from the new business, beyond the payment of the debts due to them from the old firm. There was a formal release of these debts; but we must look at the real nature of the transaction, according to the understanding of all who were parties to it. The business of Messrs. Smith & Co. was to be carried on by the trustees till the debts of that firm were paid, and then the business was to be transferred back to Messrs. Smith & Co.

The defendants can only be liable upon the supposition that the person who wrote the acceptance on the bills of exchange
* 303 was their mandatory for that purpose. I do not * mean to make any distinction between their liability on the bills, and their liability for the price of the goods supplied to the Stanton Iron Company, the consideration for the bills. But I am of opinion that the creditors of the old firm cannot be considered, by executing the deed, as having authorised the trustees as their agents either to purchase the goods or to accept the bills.

I do not think that *Waugh* v. *Carver*, or *Owen* v. *Body*, or any of the cases relied upon by the plaintiffs, makes out a participation of profits under this deed, to constitute a partnership.

I must, therefore, advise your Lordships to reverse the judgment of the Court of Common Pleas, and to adjudge that the de-

[1] Re Stanton Iron Company, 21 Beav. 164.

fendants below are not liable, as acceptors of the bills of exchange, on which the action is brought.

LORD BROUGHAM. — My Lords, I entirely agree with my noble and learned friend in the view he has taken of this case.

LORD CRANWORTH. — In this case the Judges in the Court of Exchequer Chamber were equally divided, and unfortunately the same difference of opinion has existed among the learned Judges who attended this House during the argument at your Lordships' bar. Except, therefore, from an examination of the grounds on which their opinions are founded, we can derive no benefit in this case from their assistance. We cannot say that in the opinions delivered in this House, there is more authority in favour of one view of the case than of the other. We must not, however, infer that your Lordships have not derived material aid from the opinions expressed by the Judges. These opinions have stated the arguments on the one side and the other * with great * 304 clearness and force, and what we have to do now is to decide between them.

In the first place let me say, that I concur with those of the learned Judges who are of opinion that no solid distinction exists between the liability of either defendant, in an action on the bills, and in action for goods sold and delivered. If he would have been liable in an action for goods sold and delivered, it must be because those who were in fact carrying on the business of the Stanton Iron Company were carrying it on as his partners or agents; and, as the bills were accepted, according to the usual course of business, for ore supplied by the plaintiff, I cannot doubt that if the trade was carried on by those who managed it as partners or agents of the defendant, he must be just as liable on the bills as he would have been in an action for the price of the goods supplied. His partners or agents would have the same authority to accept bills in the ordinary course of trade, as to purchase goods on credit.

The liability of one partner for the acts of his copartner is in truth the liability of a principal for the acts of his agent. Where two or more persons are engaged as partners in an ordinary trade, each of them has an implied authority from the others to bind all by contracts entered into according to the usual course of busi-

ness in that trade. Every partner in trade is, for the ordinary purposes of the trade, the agent of his copartners, and all are therefore liable for the ordinary trade contracts of the others. Partners may stipulate among themselves that some one of them only shall enter into particular contracts, or into any contracts, or that as to certain of their contracts none shall be liable except those by whom they are actually made; but with such private arrangements third persons, dealing with the firm without * 305 notice, have no concern. The public * have a right to assume that every partner has authority from his copartner to bind the whole firm in contracts made according to the ordinary usages of trade.

This principle applies not only to persons acting openly and avowedly as partners, but to others who, though not so acting, are, by secret or private agreement, partners with those who appear ostensibly to the world as the persons carrying on the business.

In the case now before the House, the Court of Common Pleas decided in favour of the respondent that the appellant, by his execution of the deed of arrangement, became, together with the other creditors who executed it, a partner with those who conducted the business of the Stanton Iron Company. The Judges in the Court of Exchequer Chamber were equally divided, so that the judgment of the Court of Common Pleas was affirmed. The sole question for adjudication by your Lordships is, whether this judgment thus affirmed was right.

I do not propose to consider in detail all the provisions of the deed. I think it sufficient to state them generally. In the first place there is an assignment by Messrs. Smith to certain trustees, of the mines and all the engines and machinery used for working them, together with all the stock in trade, and in fact all their property, upon trust, to carry on the business; and, after paying its expenses, to divide the net income ratably amongst the creditors of Messrs. Smith, as often as there shall be funds in hand sufficient to pay one shilling in the pound; and, after all the creditors are satisfied, then in trust for Messrs. Smith.

Up to this point the creditors, though they executed the deed, are merely passive; and the first question is, what would have been the consequence to them of their executing the deed * 306 if the trusts had ended there? Would they have * become partners in the concern carried on by the trustees merely

because they passively assented to its being carried on upon the terms that the net income, i.e. the net profits, should be applied in discharge of their demands? I think not; it was argued that as they would be interested in the profits, therefore they would be partners. But this is a fallacy. It is often said that the test, or one of the tests, whether a person not ostensibly a partner, is nevertheless, in contemplation of law, a partner, is, whether he is entitled to participate in the profits. This, no doubt, is, in general, a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive evidence, that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on on his behalf, i.e., that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made.

Taking this to be the ground of liability as a partner, it seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor, or the trustees. The * debtor is still the person * 307 solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors; though their consent is necessary in such a case, for without it all the property might be seized by them in execution. But the trade still remains the trade of the debtor or his trustees; the debtor or the trustees are the persons by or on behalf of whom it is carried on.

I have hitherto considered the case as it would have stood if

the creditors had been merely passively assenting parties to the carrying on of the trade, on the terms that the profits should be applied in liquidation of their demands. But I am aware that in this deed special powers are given to the creditors, which, it was said, showed that they had become partners, even if that had not been the consequence of their concurrence in the previous trust. The powers may be described briefly as, first, a power of determining by a majority in value of their body, that the trade should be discontinued, or, if not discontinued, then, secondly, a power of making rules and orders as to its conduct and management.

These powers do not appear to me to alter the case. The creditors might, by process of law, have obtained possession of the whole of the property. By the earlier provisions of the deed, they consented to abandon that right, and to allow the trade to be carried on by the trustees. The effect of these powers is only to qualify their consent. They stipulate for a right to withdraw it altogether; or, if not, then to impose terms as to the mode in which the trusts to which they had agreed should be executed.

I do not think that this alters the legal condition of the * 308 creditors. * The trade did not become a trade carried on for them as principals, because they might have insisted on taking possession of the stock, and so compelling the abandonment of the trade, or because they might have prescribed terms on which alone it should be continued. Any trustee might have refused to act if he considered the terms prescribed by the auditors to be objectionable. Suppose the deed had stipulated, not that the creditors might order the discontinuance of the trade, or impose terms as to its management, but that some third person might do so, if, on inspecting the accounts, he should deem it advisable: it could not be contended that this would make the creditors partners, if they were not so already; and I can see no difference between stipulating for such a power to be reserved to a third person, and reserving it to themselves.

I have, on these grounds, come to the conclusion that the creditors did not, by executing this deed, make themselves partners in the Stanton Iron Company, and I must add that a contrary decision would be much to be deprecated: Deeds of arrangement, like that now before us, are, I believe, of frequent occurrence; and it is impossible to imagine that creditors who execute them have any notion that by so doing they are making themselves liable

as partners. This would be no reason for holding them not to be liable, if, on strict principles of mercantile law, they are so; but the very fact that such deeds are so common, and that no such liability is supposed to attach to them, affords some argument in favour of the appellant. The deed now before us was executed by above a hundred joint creditors; and a mere glance at their names is sufficient to show that there was no intention on their part of doing any thing which should involve them in the obligations of a partnership. I do not rely on this; but, * at * 309 least, it shows the general opinion of the mercantile world on the subject. I may remark that one of the creditors I see is the Midland Railway Company, which is a creditor for a sum only of 39*l.*, and to suppose that the directors could imagine that they were making themselves partners is absurd.

The authorities cited in argument did not throw much light upon the subject. I can find no case in which a person has been made liable as a dormant or sleeping partner, where the trade might not fairly be said to have been carried on for him, together with those ostensibly conducting it, and when, therefore, he would stand in the position of principal towards the ostensible members of the firm as his agents. This was certainly the case in *Waugh* v. *Carver*.[1] There Messrs. Carver, who were ship agents at Portsmouth, agreed with Gresler, a ship agent at Plymouth, that if he would establish himself as a ship agent at Cowes, they would share between them the profits of their respective agencies in certain stipulated proportions. When, therefore, Gresler, in pursuance of the agreement, did establish himself at Cowes, and there carry on the business of a ship agent, he, in fact, carried it on for the benefit of Messrs. Carver as well as of himself; and the Court held that, in these circumstances, the stipulation which they had entered into that neither party to the agreement should be answerable for the acts of the other, was a stipulation which they could not make so as thereby to affect third persons. Each firm was carrying on business on account not only of itself but also of the other firm; this, therefore, made each firm the agent of the other.

* The case of *Bond* v. *Pittard*[2] could admit of no doubt. * 310 The question was, whether G. H. Watts and P. H. Watts could sue jointly for business transacted by them as attorneys.

[1] 2 H. Bl. 235. [2] 3 M. & W. 357.

They had agreed to become partners on a stipulation that P. H. Watts should always receive 300*l.* yearly out of the first profits as his share, and should not be liable for any losses. It was argued that this latter stipulation prevented them from being partners; but the Court held the contrary. Each of them worked for the common benefit of both, and each of them, therefore, acted as agent of the other. The produce of the labour of each was to be brought into a common fund, to be afterwards shared according to certain arrangements between themselves. The case was really free from doubt.

A similar principle explains and justifies the decision of the Court of Common Pleas in *Barry* v. *Nesham.*[1] The question was, whether the defendant was liable for goods furnished to one Lowthin in the way of his business as the printer and publisher of a newspaper. Nesham had sold the stock and good-will of the paper to Lowthin, in consideration of 1500*l.*, and on a farther stipulation, that for seven years the profits were to be applied as follows: that is to say, Lowthin was to have the first 150*l.* of the annual profits, then Nesham was to have them to the extent of 500*l.*, if they made so much, and Lowthin was to have all beyond. It is clear that Lowthin was conducting the business for the common benefit of both, subject to their private arrangements as to the shares they should separately be entitled to; Lowthin was, therefore, clearly the agent of Nesham.

Owen v. *Body* is at most a case in which a *dictum* may * 311 * be found. The Court of Queen's Bench was quite right in holding that the creditors were justified in refusing to execute the deed tendered to them; and that is all which was decided.

None of the other cases cited carried the doctrine farther than those I have referred to, and I therefore think that in this case the judgment appealed against ought to be reversed.

LORD WENSLEYDALE. — These two cases came before your Lordships on appeal from the Exchequer Chamber, by which Court a judgment of the Court of Common Pleas was affirmed. They both involved the same question. The Court of Common Pleas was unanimous in favour of the plaintiff below. The Court of

[1] 3 C. B. 641.

Exchequer Chamber, consisting of six learned Judges, and the six learned Judges who have given their advice to your Lordships, have been equally divided. I am of opinion that the judgment of the Court of Common Pleas was wrong, and that it ought to be reversed.

The question is, whether either of the defendants, Cox or Wheatcroft, was liable as acceptor of certain bills of exchange, dated in March, April, and June, 1855, drawn by the plaintiff below on the Stanton Iron Company, and accepted by one James Haywood as *per proc* that company. And the simple question will be this, whether Haywood was authorised by either of the defendants, as a partner in that company, to bind him by those acceptances.

Haywood must be taken to have been authorised to accept for them by those who actually carried on business under that firm. Were the appellants partners in it? The case will depend entirely on the construction of the deed of the 13th November, 1849. There is no other evidence affecting either of them. And the question is, * whether the subscription of both, as cred- * 312 itors of the Smiths, made them partners in the business carried on by the trustees in the name of the Stanton Iron Company. Wheatcroft could not be liable in the character of trustee, for he had ceased to be such before the bills were drawn, and the plaintiff knew it.

The terms of the deed have been so fully brought before your Lordships, that I do not consider it necessary to state them at any length. One of the provisions in the deed was this authority to the trustees to execute all contracts and instruments in carrying on the business, which would certainly authorise the making or accepting bills of exchange.

The question then is, whether this deed makes the creditors who sign it partners with the trustees, or, what is really the same thing, agents, to bind them by acceptances on account of the business.

The law as to partnership is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy of solution the questions which arise on this subject, if this true principle were more constantly kept in view. Mr. Justice Story lays it down in the first section of his work on Partnership. He says: "Every partner is an agent of the partnership,

and his rights, powers, duties, and obligations, are in many respects governed by the same rules and principles as those of an agent: a partner virtually embraces the character of both a principal and agent." Pothier says:—"*Contractus societatis, non secus ac contractus mandati.*"—Pand. lib. 17. tit. 2. Introduction.

A man who allows another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the per-
* 313 son so employed is the agent, and the principal is liable * for the agent's contracts in the course of his employment. So if two or more agree that they should carry on a trade, and share the profits of it, each is a principal, and each is an agent for the other, and each is bound by the other's contract in carrying on the trade, as much as a single principal would be by the act of an agent, who was to give the whole of the profits to his employer. Hence it becomes a test of the liability of one for the contract of another, that he is to receive the whole or a part of the profits arising from that contract by virtue of the agreement made at the time of the employment. I believe this is the true principle of partnership liability. Perhaps the maxim that he who partakes the advantage ought to bear the loss, often stated in the earlier cases on this subject, is only the consequence, not the cause, why a man is made liable as a partner.

Can we then collect from the trust deed that each of the subscribing creditors is a partner with the trustees, and by the mere signature of the deed constitutes them his agents for carrying on the business on the account of himself and the rest of the creditors? I think not. It is true that by this deed the creditors will gain an advantage by the trustees carrying on the trade: for if it is profitable, they may get their debts paid: but this is not that sharing of profits which constitutes the relation of principal, agent, and partner.

If a creditor were to agree with his debtor to give the latter time to pay his debt till he got money enough out of his trade to pay it, I think no one could reasonably contend that he thereby made him his agent to contract debts in the way of his trade: nor do I think that it would make any difference that he stipulated that the debtor should pay the debt out of the profits of the trade.

The deed in this case is merely an arrangement by the

* Smiths to pay their debts, partly out of the existing funds, * 314
and partly out of the expected profits of their trade; and
all their effects are placed in the hands of the trustees, as middlemen between them and their creditors, to effect the object of the deed, the payment of their debts. These effects are placed in the hands of the trustees as the property of the Smiths, to be employed as the deed directs, and to be returned to them when the trusts are satisfied. I think it is impossible to say that the agreement to receive this debt, so secured, partly out of the existing assets, partly out of the trade, is such a participation of profits as to constitute the relation of principal and agent between the creditors and trustees. The trustees are certainly liable, because they actually contract by their undoubted agent; but the creditors are not, because the trustees are not their agents. The case of *Owen* v. *Body*,[1] on which some reliance was placed, is really no authority for holding that the creditors by subscription became actual partners. In the short judgment of Lord Denman, the expression used is not that the deed imposed such conditions as *would have* constituted a partnership amongst those who subscribed it, but as *might have* had the effect, which is a much more doubtful expression. It was quite enough for the decision of that case, that the subscription exposed them to the peril of being considered partners, of which peril the opinions of a majority of the Judges leave no doubt; and that prevented the deed from being a fair deed, and good against creditors. So did the provision that the effects, which ought to have been divided equally amongst the creditors, should be put in peril by being employed in trade.

The case of *Janes* v. *Whitbread*,[2] which was distinguished
* as authorising a trader to wind up, can hardly be sup- * 315
ported on the ground of that distinction. It exposed the creditors signing to perils, though not in the same degree.

The case of *Bond* v. *Pittard*,[3] cited on the part of the plaintiff, turned entirely upon the special circumstances, it being perfectly clear that both the two attorneys, of whom the plaintiff was assignee, were the parties with whom the contract was made, independent of the circumstance of a payment of fixed sums being made to one out of the profits. It was not that fact that was con-

[1] 5 A. & E. 28.
[2] 20 Law J., N. S., C. P. 217.
[3] 3 M. & W. 357.

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Per Lord Wensleydale. The demand ought not to be made, at the option of the landlord, on the tenant or his assign, but on him whom the landlord would, under existing facts, reasonably consider as the person entitled to ask for a renewal.

By an indenture, made 30th June, 1713, between Benjamin Beeston of the one part, and Humphrey Griffith of the other part, certain lands in the county of Sligo were demised by the former to the latter for lives, with a covenant on the part of the lessor, his heirs, &c., for perpetual renewal, so often as any one of the lives should drop, within nine calendar months from the dropping of such life, upon payments and conditions therein mentioned. There had been several renewals. On the 17th November, 1838, there was a renewal for the lives of the lessee of a Mr. Owen Wynne, and the present Duke of Cambridge. In 1840, Henry Griffith, the then tenant, mortgaged the lands in question to the Reverend John Galbraith, to secure repayment of a sum of 1877*l.* on a day certain. The mortgagor covenanted, that so often as any of the lives should drop, he would pay the renewal fines, and obtain renewal of the lease, and that the same should enure to the use of the mortgage deed, or that he would concur with the mortgagee in obtaining such renewals. The money was * not * 317 paid, and the conditional estate became absolute at law in the mortgagee. Griffith was, however, still allowed to continue in possession. The mortgage was registered. Owen Wynne died 12th December, 1841. Neither the mortgagee nor the appellant, his son, who was now entitled to all the rights belonging to his father, had any knowledge of Owen Wynne's death. A notice to renew was, in the early part of 1850, served on Griffith, the tenant in possession, but he took no steps to procure a renewal at that time, but afterwards, in 1855, filed a cause petition in Chancery to obtain a renewal. This cause petition was dismissed. The appellant received information of this unsuccessful suit, and on the 18th April, 1856, wrote a letter to the landlord's solicitor, demanding a renewal of the lease, tendering a draft renewal, and offering to pay what was due for fines, &c. The landlord declined to renew. On the 3d January, 1857, the appellant filed his cause petition in the Court of Chancery under the 19 & 20 Geo. 3, c. 30,[1]

[1] 19 & 20 Geo. 3, c. 30, commonly called the "Irish Tenantry Act." It recites that many lands in Ireland are held under leases for lives, renewable on fines; that they are settled to make provisions for families and creditors who may

* 318 setting forth * the facts, and praying that it might be declared that he was entitled to a renewal of the lease, and that an account might be taken, &c., and for farther relief. In support of this petition he filed an affidavit verifying the petition. The affidavit was in these words: "That so much of the above written petition as relates to my own acts and deeds is true, and so much as relates to the acts and deeds of any other person I believe to be true." The answering affidavit of the respondent set forth that "This respondent had no knowledge or notice whatever of the existence of the mortgage until after the filing of the cause petition by Henry Griffith; that the said John Galbraith and the petitioner were not, nor was either of them, in the possession of the said lands and premises, or any part thereof, at any time, to the knowledge or belief of the respondent. And that Henry Griffith being the tenant, and in the actual possession and receipt of the rents and profits of said lands, it was unnecessary for this respondent to serve any notice upon, or to make any demand of fines and interest from the said John Galbraith, or the petitioner, or any other person entitled to the said mortgage; and that even if it should be necessary to serve such notice and make such demand, that the service of the several notices upon, and the said several demands of this respondent from, the said Henry Griffith, should be deemed to be sufficient service and demand upon and from the said mortgagees, on the ground that H. Griffith, while he so continued in possession and receipt of the rents and profits, was to be considered as an agent of and for the mortgagees; and that therefore the petitioner is bound by the laches and neglects of the said H. Griffith, and that the petition of the said H. Griffith having been dismissed as aforesaid, it is not competent for the said

be ruined if advantage is taken of neglects to pay fines; therefore it directs (§ 1) that "Courts of equity, upon an adequate compensation being made, shall relieve such tenants and their assigns against such lapse of time, if no circumstances of fraud be proved against such tenants or their assigns, unless it shall be proved to the satisfaction of such Courts that the landlord, or lessors or persons entitled to receive such fines, had *demanded such fines from such tenants or their assigns*, and that the same had been refused or neglected to be paid within a reasonable time after such demand." Section 2 provides, "that in case the landlord shall find any difficulty in discovering his tenant, or the assignee of such tenant, so as to make a demand on such tenant, or assignee," a demand made on the lands from the principal occupier, together with a notice in the Gazette, shall be deemed sufficient.

petitioner to seek a renewal of the * said lease; and that * 319 under all the circumstances of this case, the appellant is not entitled to have a renewal of the said lease."

The cause came on for hearing before the Right Honourable Maziere Brady, the Lord Chancellor of Ireland, who by a decretal order of the 5th June, 1857, dismissed the cause petition with costs. (6 Ir. Ch. Rep. 518.)

The appeal was against this order.[1]

Mr. R. Palmer and *Mr. W. D. Griffith* for the appellant.—This is the first decision which, in fact, declares that the mortgagee shall lose his right through the negligence of the tenant; and that certainly was not the intention of the Legislature. A summary of the provisions of all the Irish Tenantry Acts is given in Furlong's Law of Landlord and Tenant in Ireland.[2] All proceed on the principle that advantage shall not be taken of ignorance or surprise. Thus, under the 8 Geo. 1, c. 2, a mortgagee of a lessee may redeem a forfeited estate nine months after the landlord has recovered judgment against the lessee; *O'Reilly* v. *Featherston*.[3] And where a landlord had, in order to prevent this exercise of the right of redemption, made an agreement with the mortgagee of the tenant, the tenant himself was allowed to come in and redeem; *Kent* v. *Roberts*.[4] It is part of the law of Ireland that mortgages must be on the register. The landlord must therefore know of them, and he is required by the Act now in question, to make his demand on "such tenants or their * assigns;" * 320 and it is only in the event of his being unable to discover either, that his demand on the principal occupier is treated as sufficient by the Act (§ 2). In fact the assignee is in the situation of a purchaser, and there can be no doubt that the demand ought to be made on him alone. The word "assigns," therefore, it is clear, is to be construed according to its proper legal signification, and does not apply to a mere under lessee. All the persons who are assigns, in the proper meaning of that word, are therefore entitled to notice, and those who have not had it, are not bound.

The case relied on by the Court below was that of *Barrett* v.

[1] The Lord Chancellor (Lord Campbell) was prevented by a severe domestic affliction from being present. Lord Cranworth presided at the hearing.

[2] Vol. 1, c. 5.

[3] 2 Dow & C. 39.

[4] 3 Irish Eq. 279.

Burke.[1] There a renewable lease was made by A. to B., on certain terms. B. underleased to C., on the same terms, covenanting to renew regularly with A. C. renewed with B., but B. never renewed with A. The representative of A. made a formal demand on C. for the fines due to A.: this demand was neglected, and it was held under the circumstances which there existed, that C. had no claim in equity for a renewal. Though the decision there was against the assignee, there is not a single word in the judgment of Lord Redesdale to suggest that the person from whom the demand is to be made must be the mortgagee in possession, and the case went entirely on the matter of negligence. *John* v. *Armstrong*[2] shows that there must be a distinct demand on the tenant or assignee, and that where there is more than one joint tenant, a demand on one will not work a forfeiture as to the rest. And Lord Plunket's observations plainly show that, where there was no fraud on the part of the one from whom the fines had not been demanded, he was not to suffer from the neglect of the other.

* 321 In *Wallace* v. *Patten*,[3] * though, on the facts, the judgment was against the claim for a renewal, yet a mortgagee, not in possession, was treated as an "assign." Indeed, the time for doubting the proposition that he is so, may be considered as gone by ever since the case of *Williams* v. *Bosanquet*.[4] *Watkins* v. *Lloyd*[5] is to the same effect as the other Irish cases. *Townley* v. *Bond*, before Lord Chancellor Sugden,[6] shows that where a lease of this kind has been put in settlement, the interests of all the parties are to be consulted, and that one is not to suffer for the default of another. The case of *Orr* v. *Littlewood*[7] has followed the present case, but then it does not appear whether there was in that case a legal assignment or not, or none at all.

Lord Chancellor Brady said, "the mere circumstance of an outstanding legal estate being vested in a party, unquestionably does not make him the proper person to serve with notice," and he referred to *Smith* v. *Shannon*,[8] where it was held, that the assignee of an insolvent not in possession, was not an "assign," within the meaning of the Tenantry Act, from whom a demand of renewal fines should be made. The principle was, that the demand was

[1] 5 Dow, 1.
[2] Lloyd, & G. *temp*. Plunk. 392.
[3] 1 Irish Eq. 338.
[4] 1 Brod & B. 238.
[5] Hayes & Jones, 832.
[6] 4 Drury & War. 240.
[7] 8 Irish Ch. N. S. 348.
[8] 3 Irish Eq. 452.

not good, as it was not made on the heir at law of the insolvent. But that was practically overruled by a decision of this House in *Rochfort* v. *Battersby*.[1] It does not appear that this latter decision was presented to the notice of Lord Chancellor Brady.

The covenants in the mortgage make no difference. There is the ordinary covenant by the mortgagor that he will, as often as the lives drop, pay the renewal fines, and obtain a renewal, or concur with the mortgagee in all lawful acts for * this * 322 purpose. This does not free the landlord from the performance of his duty to make the demand, nor does it constitute the mortgagor the agent of the mortgagee for the purpose of obtaining the renewals. It is said that he must be so, for that if the mortgagor had renewed, the mortgagee would have had the benefit of the renewal, but the same argument applies to joint tenants. Yet it has been expressly held, that the default of one joint tenant does not deprive another of his right; *John* v. *Armstrong*.[2]

By the terms of the statute, the Court, "on adequate compensation," is to relieve, "if no circumstance of fraud be proved against such tenants or their assigns," or unless a demand has been made and payment of the fines refused or neglected. There has been no demand here on the mortgagee, who is the only proper person on whom the demand could be made, and it is not even pretended that there has been any fraud, so that the case of *Butler* v. *Portarlington*[3] cannot be cited against the appellant. As to delay, the observations of Lord Redesdale in *Jackson* v. *Saunders*[4] apply; and as there has not been here any such "continued neglect as amounts to wilful default," the appellant is entitled to relief.

The equity now sought to be enforced is peculiarly known and acted on in Ireland, where a lease with a covenant for perpetual renewal on fines is considered as the equivalent of an estate of inheritance. *Lacon* v. *Mertins*[5] shows that though where the mortgagor has not covenanted to renew, the mortgagee cannot compel him to do so, he may still himself renew and charge the mortgagor with the fines, and the same rule has * been ap- * 323 plied in the case of joint-tenants; *Hamilton* v. *Denny*.[6]

Sir H. Cairns and *Mr. Cole* for the respondent. — There are

[1] 2 H. L. Cas. 388.
[2] Lloyd & G. *temp*. Plunk. 392.
[3] 1 Drury & War. 20.
[4] 1 Sch. & L. 443, 464; 2 Dow, 437.
[5] 3 Atk. 4.
[6] 1 Ball & B. 199.

four propositions here, any one of which is decisive against the appellant. First, that the tenant in making an assignment by way of mortgage, does not cease to be the tenant within the meaning of the statute. Secondly, that by the Tenantry Acts of Ireland, whatever may be the nature of the assignment, no assignee becomes such within the meaning of the Act, till the landlord has had clear and distinct notice of the assignment. Thirdly, that assuming the mortgagee to bear the legal character of "assign" within the words of the Act, the mortgagor, being left in possession, becomes the agent of the mortgagee for the purpose of receiving notice. And, fourthly, the omission by the mortgagee, under such circumstances, to give notice to the landlord, amounts to fraud within the statute. The Act is addressed solely to Courts of equity; it does not pretend in any respect to use the language of Courts of law. In equity, a mortgagor is still the owner of the land though he has parted with the legal estate, and he is, therefore, the person to pay the fine on renewal, and this applies most strongly when the mortgagor continues in possession. The mortgagee is merely a person who gets a pledge for his debt, and, as the statute is in the alternative, if the demand must be made on the mortgagee, the landlord is released from making it on the mortgagor. That never could have been intended in cases where there has not been any previous notice. A tenant in possession would be bound to pay his rent to the mortgagor if he had not received express notice to pay it to the mortgagee, and with-
* 324 out such notice his payment to the * mortgagor would exempt him from all liability to the mortgagee. The Act was made to keep every thing clear for landlords, yet the doctrine now contended for would impose on the landlord, even where there had been no change of possession, the necessity of making inquiries as to a change of interest. The covenants between the parties, by which the mortgagor binds himself to do all that is necessary to obtain a renewal, makes the mortgagor the agent of the mortgagee. There is here no surrender for the purpose of renewal; the old and the new leases are concurrent, otherwise there would be an end of the covenant, and the new lease would invalidate the old one.

The service of demand on the tenant in possession was sufficient. In *Fitzsimon* v. *Burton*,[1] it was held that service in England upon

[1] Finlay on Renewal, 284. Referred to in argument in Trant *v.* Dwye, 1

a servant of the tenant, at the house of the latter, was sufficient; and no notice having been taken of the demand so served, the landlord had a right to eject. The case of *Butler* v. *Portarlington*[1] is applicable here. It was not there meant that the Courts of equity will give relief in all cases except those in which there has been on the part of the tenant what is ordinarily called fraud; they will not do so where there is fraud within the meaning of Courts of equity. Negligence of this sort comes under that description. In *Jackson* v. *Saunders*[2] it was held, that the tenant had by long neglect forfeited his right to renewal, and Lord Eldon expressly declared,[3] that he would "not go the length of saying that long neglect and supineness might not amount to a fraud." And * in *Barrett* v. *Burke*, Lord Redesdale treats[4] * 325 wilful neglect in the same manner.

The landlord here had no notice of the mortgage. Registration of a mortgage is not notice for such a purpose, nor is the landlord bound to search the register to know if there has been any change of interest; and if he did, though he might find some assignments registered, there would be others which were not registered. He is entitled to express notice, most especially where the actual possession is retained by the mortgagor, and if he does not receive such notice, he is fully entitled to treat the person in possession as the person to be served. *John* v. *Armstrong*[5] does not cast on the landlord the duty of inquiring whether there has been a change of interest, for the only question there was, whether an objection by the sub-tenant, in conversation with the landlord, to pay the fines before the head tenant had obtained a renewal, dispensed with the necessity of a formal demand of payment. On the other hand, *Barrett* v. *Burke*,[6] *Watkins* v. *Lloyd*,[7] *Butler* v. *Portarlington*,[8] and *Townley* v. *Bond*,[9] all show that a service on the tenant in possession, having an interest in the lease, is sufficient. *Smith* v. *Shannon*[10] does not oppose that doctrine, for there the person served was merely the assignee of an insolvent

Dow & C. 134, where (sub nom. Burton *v.* Scriven) it is said to be "not yet reported," and substantially stated, Sugd. Law of Prop. c. 4, § 5, p. 565.

[1] 1 Drury & War. 20.
[2] 1 Sch. & L. 443; 2 Dow, 437.
[3] 2 Dow, 456.
[4] 5 Dow, 18.
[5] Lloyd & G. *temp*. Plunk. 392.
[6] 5 Dow, 1.
[7] Hayes & Jones, 832.
[8] 1 Drury & War. 20.
[9] 4 Drury & War. 240.
[10] 3 Irish Eq. 452.

debtor; and it was held that he was not a person having an interest in the lease, so as to come within the term "tenant or assign." And that doctrine has been adopted by all the text-writers.

Mr. R. Palmer replied.

*326 *LORD CRANWORTH.—My Lords, in this case the fine was certainly demanded from Henry Griffith, by the respondent, Cooper, who was the person entitled to it as lessor, and it was never paid. The only question is, whether Griffith was the tenant, within the meaning of the statute, on whom the demand was to be made.

There is no question but that all right to renewal on the part of Griffith is gone. But the appellant contends that he, and not Griffith, was the party entitled to renew, and that as no demand for the payment of the fines was made on him, his right remains unaffected.

In support of his argument, the appellant relied on the well-established doctrine, that an assignee by way of mortgage of a leasehold estate, is subject to all the same liabilities as between himself and the landlord or lessor, as an absolute assignee. The demand contemplated by the statute is to be made (it was argued) on the tenant or his assigns; that is, on the tenant himself if he has not assigned, or on the assignee if he has. The appellant contended that if his ancestor, John Galbraith, instead of a mortgagee, had been a purchaser, and if the assignment to him had not been subject to any right of redemption, then he would certainly have been the person on whom the demand ought to have been made. And the authorities (it was contended) show that the circumstance of there being a right of redemption in the assignor, makes no difference in the rights and liabilities of the assignee and his representatives.

This reasoning has not convinced me. It is quite true that when a lessee has assigned his interest, whether in a lease for lives or a lease for years, to another, the assignee becomes *327 liable to the lessor on all the covenants in the *lease on the part of the lessee, which run with the land. And it is also true that this liability arises whether the assignment be an absolute assignment or an assignment by way of mortgage.

There is no doubt that in this case the respondent might maintain an action against the appellant for the rent, or for a breach of any of the covenants entered into by Griffith, in the lease of 17th November, 1838, which are covenants running with the land. But that is not the point for our decision. The question is, not what are the appellant's legal liabilities as assignee of the lease, but whether he was the particular person from whom the respondent, as lessor, ought to have demanded the renewal fine, in order to free himself from the equitable obligation of granting a renewed lease.

In considering this question, it must be borne in mind that the statute was not intended to introduce a new law, but rather to sanction that which had long been acted upon as being the law, and to make more clear the rights both of landlords and tenants on this subject of renewal. The statute is evidently, and in its whole framework, addressed solely to Courts of equity. Those Courts are directed, in language of a very general and popular character, to relieve tenants and their assigns against lapse of time. This can only be done by granting to them specific performance of their covenants for renewal, though the legal rights under those covenants may have expired by lapse of time. But then the Legislature, considering that the obligation thus imposed on, or rather recognised as existing in, Courts of equity, if left without restriction, might act unfairly on landlords, qualified the generality of the enactment by saying that it shall not apply to cases where the landlord has demanded the fine from the tenant or his assigns, and payment has been refused or unreasonably delayed. In such a case the statute affirming or sanctioning the right of the
* tenant does not apply. The Legislature evidently intended * 328
to enable the landlord, by his vigilance, to secure himself against the conduct of the tenant, whose interest it would be to delay the renewal as long as possible. The provision was in truth but a statutable recognition of the principles which, if there had been no statute, would have guided, or ought to have guided, the Courts in enforcing the equitable right of the tenant.

In considering the question, therefore, whether, when the tenant has assigned his whole interest by way of mortgage, but has been suffered to remain in possession without notice of the mortgage to the landlord, the demand referred to in the statute ought to be made on the tenant or his mortgagee, it will be right to consider

what the Court would have expected of the landlord, on general principles of equity, independently of the statute. In such a case there cannot, I apprehend, be any doubt that if the landlord, on discovering that a life had dropped, had applied to his lessee in possession to renew, and he had refused, or, which would be the same thing, had unreasonably delayed to pay the fine, the Court would never afterwards have listened to any farther application for a renewal. The mortgagee would have had no ground of complaint, for it was his own folly or laches not to give notice of his title to the landlord. The language of the Court would have been, that by leaving the mortgagor in possession as apparent owner, without intimation of any change of title, he must be considered to have authorised the landlord to continue to deal with him as his tenant.

And without going the length of saying that in these circumstances the mortgagor in possession would be the agent of the mortgagee, I think it clear that on general principles the Court would not allow the mortgagee to say, as between himself and the * 329 landlord, that he was not bound * by the dealings of the latter with the mortgagor. To permit this would be to permit the mortgagee to do what, if it did not actually amount to a fraud, would have all the ill consequences of a fraud, on the landlord.

If this would have been the doctrine of a Court of equity, independently of the statute, we may safely take that doctrine as our guide in interpreting the language of the statute. We may safely conclude, when the Legislature speaks of a demand on the tenant or his assigns, that a demand, as in the present case, on the lessee himself, to whom the demise was made, and who has remained in possession as apparent owner, in a case in which the party making the demand had no notice of a mortgage, is well made, and that no subsequent claim for renewal can be set up by the mortgagee.

In thus holding, we are doing no injustice to any one; for the mortgagee can always protect himself by giving notice of the assignment to the landlord. Whether, in case of notice so given, it might not be necessary for the landlord, in order to foreclose the right of renewal, to make demand on the mortgagor, as well as on the mortgagee, it is not necessary for us to decide. Certainly, both mortgagor and mortgagee would in such a case have an interest in the renewal. And, considering that the mortgagee, in case his security was ample, might often, consistently with his own

safety, take no notice of the demand, and so the interests of the mortgagor might be materially prejudiced, it would not, I think, be unreasonable to hold on general principles of equity that in such a case the demand, in order to bar the right of the tenant, must be made on both. I see nothing in the statute to prevent such an application of its enactments; that, however, is not the case now before the House, for here the landlord had no notice of the mortgage.

* I do not forget the argument at the bar that the mortgage * 330 might have been known to the landlord if he had searched the register. It is a sufficient answer to say that the register is not notice of the documents it contains, and the landlord was under no obligation to search it. Besides, as was truly observed, it is not necessary to the validity of a mortgage that it should be registered. A mortgagee, by assignment from the tenant whose mortgage is not registered, comes within the description in the statute of an *assign* of the tenant equally with one whose security is registered.

Several authorities were cited by the appellant, but none of them supports his argument. The three cases reported in Dow's Reports, and which were decided on appeal to your Lordships when Lord Eldon held the Great Seal, and Lord Redesdale assisted in advising the House, namely, *Jackson* v. *Saunders*,[1] *Mountnorris* v. *White*,[2] and *Barrett* v. *Burke*,[3] all turned on the question whether the conduct of the tenant had or had not been such as to amount to culpable delay, and so to exclude him from the benefit of the statute. In none of them was there any question similar to that now before your Lordships, that is, on whom the demand of the landlord ought to be made. The same thing may be said of the late case of *Trant* v. *Dwyer*,[4] decided when Lord Lyndhurst was Lord Chancellor.

The case of *Townley* v. *Bond*[5] was decided by Sir Edward Sugden on the ground that the tenant had been guilty of gross and wilful neglect in not renewing, within a reasonable time after demand made by the landlord. In that case there were some circumstances materially bearing * on the question now * 331 under consideration. There the lease had, on the marriage

[1] 2 Dow, 437.
[2] 2 Dow, 459.
[3] 5 Dow, 1.
[4] 1 Dow & C. 125; 2 Bligh, N. S. 11.
[5] 4 Drury & War. 240.

of the tenant, been assigned to trustees on the usual trusts of a marriage settlement, so that the tenant, the husband, was only equitable tenant for life. All the demands calling for a renewal were made solely on him, and it was strongly urged that his neglect, however gross, ought not to be allowed to prejudice the interests of the children. But Sir Edward Sugden would not listen to this. He held that the trustees ought to have themselves been active, and that the landlord was not bound to look to any one as his tenant except the husband, who was the lessee in the last renewed lease. I find it impossible to distinguish that case from the present; for the proposition that there is any thing peculiar in the character of a tenant for life, more especially an equitable tenant for life, making a demand on him good for any other reason than that he, by reason of his possession, is the person whom the landlord was fairly justified in treating as the tenant, cannot certainly be maintained.

The Court of Exchequer in Ireland acted on a similar principle in the case of *Watkins* v. *Lloyd*,[1] where it was held that a demand on a tenant in tail in possession was good notwithstanding a prior subsisting interest of a substantial character in the trustees of a term.

I do not think it necessary to refer in detail to the other cases which have been cited from the Irish Reports, *John* v. *Armstrong*,[2] *Wallace* v. *Patten*,[3] and *Smith* v. *Shannon*.[4] It is sufficient to say that none of them supports the proposition for which the appellant contends. They are all consistent with what I believe to be the true principle in these cases, namely, that where * 332 the landlord has * no notice of any assignment by his tenant, the demand which he must make, in order to exclude the operation of the statute, is well made if it is made, as it was made here, on the lessee himself in possession.

On these grounds, then, I shall move your Lordships to affirm the judgment below, and to dismiss this appeal with costs.

My Lords, before I sit down, I think it right to say, that having communicated with my noble and learned friend Lord Kingsdown, who is not able now to be present, he has authorised me to say that he concurs entirely in the view of the case which I have

[1] Hayes & Jones, 832.
[2] Lloyd & G. *temp.* Plunk. 392.
[3] 1 Irish Eq. 338.
[4] 3 Irish Eq. 452.

submitted to your Lordships, and in the result at which I have arrived.

LORD WENSLEYDALE. — My lords, I concur with my noble and learned friend in advising your Lordships, that the decretal order of the Lord Chancellor of Ireland is right, and ought to be affirmed.

The material question in the case is, whether a demand made by the assignee of the lessor after a life had dropped, and which demand was not complied with, was sufficient to deprive the tenant or his assigns of the right to be relieved under the said clause.

I am clearly of opinion, that the demand under the circumstances was sufficient. The Act provides, that the demand of the renewal fines should be made from "the tenants or their assigns." According to the literal interpretation of the words, it might be made on either one or the other; and then the demand made on the tenant in this case would be quite sufficient to deprive both of their statutory right to relief. But I think this construction cannot be put on the Act; it cannot be meant to give the lessor an option to demand from either the one or the * other. I entertain no doubt that a demand ought to be * 333 on that person who, as between the lessor and the parties claiming under the lease, the lessor would reasonably consider as the person entitled to ask for a renewal, and who ought, therefore, to pay the renewal fines. Now, he had a right to look to the tenant as entitled to renew until, not only an assignment had taken place, but until he had notice of that assignment. The assignment from a lessee to an assignee, or from one assignee to another, is a fact lying wholly within the knowledge of the lessee or assignee, and until notice of that assignment to the lessor he has a right to consider the original lessee as his tenant. According to the rule of pleading at common law, whenever an assignment of a lease to another would constitute a defence to an action on the covenant or the lease, such notice should be averred, and good sense is the foundation of that rule. In this case it is not pretended that the appellant, the mortgagee, ever gave notice of his title as assignee to the respondent. It is not pretended that the respondent had knowledge of that assignment before his demand. If the mortgagee had taken possession, that would have

been sufficient notice to the lessor; for possession is *primâ facie* evidence of the title to the estate; and as that possession would be presumably known to the lessor, it would be notice of the assignment. And after such notice, the lessor would have to look, in the first instance, to the assignee for payment of rent and renewal fines.

I am of opinion, therefore, that in this case the respondent did all that could be required of him, in order to defeat the statutory right to relief, by a demand on the tenant who was in possession. He was not bound to do more. He was not to look for any other person to pay until he knew that some one else was liable as assignee of all the interest of the lease, and until he knew
* 334 also who * that person was; for no doubt that is the meaning of the term "assignee" in the statute, as Lord Redesdale said in *Barrett* v. *Burke*.[1] Where there is such an assign, and the lessor has such notice of him, he must make the demand on him. And on a close examination of the Tenantry Act, and a careful consideration of the peculiar language used, it favours the idea that the assign is a person of whom the lessor has notice. For it seems as if it was intended to provide, not for the want of knowledge who was the tenant or assignee, but for the want of discovering where the tenant or the assignee was, so as to be able to make a demand upon him. Indeed, it is difficult to suppose a case in which he did not know who his original tenant was, and who the tenant and assignee, who are put on the same footing. I find, however, that Lord Plunket, in the case of *Smith* v. *Shannon*,[2] puts a different construction on this clause, and considers that it applies to all cases where the lessee or assignee is unknown. And this, which I have mentioned as being the more correct interpretation of the words, may, therefore, be wrong. But it makes no difference in the case, as I take it to be clear that the lessor is not to take any notice of any person or assignee of whom he has no knowledge, express or implied. There is certainly nothing which calls upon him to take a journey to Dublin to inspect the register, or which would make his position different in a county or kingdom where there was a register from what it would be in one where there was not.

In this view of the case, it is unnecessary to say any thing upon the other questions which have been discussed at your Lordships'

[1] 5 Dow, 20. [2] 3 Irish Eq. 452.

bar. I do not mean to intimate any difference of opinion from that expressed by my noble and *learned friend. *335 When the assignment is only by way of mortgage, and notice is given of that assignment, it may not be sufficient to make a demand on the assignee, though the assignment of the legal interest makes him liable to the covenants at law; *Williams* v. *Bosanquet*.[1]

The whole interest, both legal and equitable, is not in him, and demand on the tenant as well as his assignee may be necessary, which would not be the case if the entire interest, legal and equitable, had been assigned. Nor need it be decided whether the mortgagor was agent for the mortgagee so as to make a demand upon him, a demand on the mortgagee. Nor need any thing be said upon the question whether, if there were several assignees of divided shares, or assignees as joint tenants, or tenants in common of the whole estate, and the lessor had notice of such assignment, a demand from one would be a demand from all, though it would be a very reasonable course to make such a demand. Nor need any observation be made as to the appellant having disqualified himself from obtaining relief by fraud, nor upon some of the questions discussed in the case of *Smith* v. *Shannon*.[2] It is quite enough for the decision of this case to say, that the lessor may put an end to the claim for renewal by a demand on the tenant, if he has no notice or knowledge of the assignment to another.

Lord Chelmsford. — The question is whether a mortgagee, by assignment of a lease for lives renewable for ever, who is not in possession, and has not given notice of his mortgage, the mortgagor continuing his possession in the same manner as *before the mortgage, is an assignee upon whom a demand *336 of the fine for renewal ought to be made under the Irish Tenantry Act.

From the wording of the first section of that Act, it would appear that the Legislature had in view only the case of the tenant remaining in possession, or of an assignee of the tenant to whom the possession as well as the title had been transferred; because it supposes the demand to be made upon the person bound to pay the

[1] 1 Brod. & B. 238.

[2] 3 Irish Eq. 452.

fine, whose refusal or neglect to pay within a reasonable time deprives him of his claim to relief. And this same view is carried out in the following section, which provides that where the landlord shall find any difficulty in discovering his tenant, or the assignee of his tenant, the demand of the fine is to be made upon the lands from the principal occupier, as if he was the person *primâ facie* liable to pay the fine, and to whose benefit the renewal would enure. Although an assignment of the lease by way of mortgage makes the mortgagee an assignee at law, and so liable to the rent and covenants, yet he is not in receipt of the rents and profits which are received by the mortgagor, whether remaining in possession of the land or having underlet it to an occupying tenant. The mortgagor is primarily interested in the renewal by his equity of redemption, and is the proper person to pay the fine. And therefore, if it were necessary to decide upon whom the demand ought to be made where the landlord has notice that the tenant has mortgaged his interest, I should be disposed to think that it might still be proper to make it upon the mortgagor. But if there is any doubt upon this point, I think none can fairly arise where the mortgagee gives no notice of his mortgage, and leaves the mortgagor in the same possession of the land as before. * 337 The landlord, before he makes a demand of * the fine, cannot be bound to inquire whether the lease has been assigned, but is entitled to assume that the former state of things continues, and that the tenant remains his tenant still. And the mortgagee, who knows the renewable nature of the interest, and that a demand not complied with will bar all equitable relief, and who chooses to leave the tenant *in statu quo* and to keep his own interest out of sight, may fairly be considered as having agreed that the mortgagor shall continue tenant for the purpose of the demand.

Therefore, whether we regard the apparent continuance of the same relation between the landlord and his tenant, the mortgagor, or the acquiescence of the mortgagee in the mortgagor's continuing to represent the interest in the lease, in the one case the demand upon the known tenant would be the only possible one, and in the other the tenant might not unreasonably be considered as the agent of the mortgagee to receive the demand; and in either view, by a demand upon the tenant, the intention of the Legislature would be satisfied.

I think, therefore, that the decree is right, and ought to be affirmed.

Decretal order affirmed, and appeal dismissed with costs.

Lords' Journals, 3d April, 1860.

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* SOMES AND OTHERS v. THE DIRECTORS OF THE BRITISH EMPIRE SHIPPING COMPANY. * 338

1860. May 22.

JOSEPH SOMES and others, ... *Plaintiffs in Error.*
THE DIRECTORS of the BRITISH EMPIRE SHIPPING COMPANY, ... } *Defendants in Error.*

Charge for keeping a Chattel. An enforcement of a lien. Money had and received.

A person who has a lien upon a chattel for a debt cannot, if he keeps it to enforce payment, add, to the amount for which the lien exists, a charge for keeping the chattel till the debt is paid.

Where such a charge is made, and the owner of the chattel gives notice that he will pay it, but that he protests against the payment, and will seek to recover it back again, he may maintain an action for money had and received for such a purpose.

A ship-owner desired to have his ship repaired. On asking a shipwright for an estimate, he received one, the last item of which was "The cost of use of graving dock for the job will be from one hundred and twenty to one hundred and fifty guineas." The ship was repaired. When finished, the account was sent in with this item included. No objection was made to this item, but time was required for payment. The shipwright who claimed and enforced his lien on the ship for payment, urged the removal of the ship, saying it was unnecessarily occupying his dock, that he had other ships waiting to go in, and finally, that from a certain day he should charge 21*l.* a day for the use of the dock:

Held, these facts did not constitute an implied contract on the part of the ship-owner to pay the additional charge, and that (having paid it under protest) he might maintain money had and received to recover it back.

MESSRS. SOMES, the plaintiffs in error (defendants in the original action), were shipwrights, and were the owners of a graving dock used for repairing ships. The company was possessed of several

vessels, one of which, the "British Empire," was in need of extensive repairs. The directors, who were throughout represented by Mr. Wilson, the ship's husband, entered into a correspondence with Messrs. Somes, represented by their general manager, Mr. Preston, as to the terms on which the ship could be repaired. In a letter, dated 25th August, 1856, Mr. Preston stated the general cost of the required repairs, and added, "The cost * 339 * of use of graving dock for the job will be from one hundred and twenty to one hundred and fifty guineas." . . . "The above prices subject to seven and a half per cent. discount for cash, except dock dues." The ship was sent, and the repairs were completed. The account was sent in, but there was some difficulty in providing for the payment of it. Messrs. Somes refused to give up the ship except on payment. A correspondence arose on this subject. In a letter of the 15th November, 1856, Messrs. Somes said, "The whole work is now well nigh completed, and the ship is occupying our dock to no purpose; we must, therefore, beg the favour of an early settlement." A mortgage was proposed and prepared, but not executed. On the 25th November, they wrote again, "We also give you notice, that we shall charge the owners of the ship 21*l.* per day[1] for the hire of our dry dock from the time our account was delivered up to the 20th instant." On the 27th November, Messrs. Cotterill, the attorneys for the company, wrote to say, that the letter of the 25th had been forwarded to them, and said, "We of course dispute Messrs. Somes' right to make any such claim, and we are instructed by the company to, and hereby give Messrs. Somes notice, that the company will hold them responsible for all damages consequent on the detention of the ship." Farther correspondence took place, and on the 18th December, Messrs. Cotterill, on behalf of the company, wrote to give notice, that "we are prepared to pay you whatever sum you demand, under protest, and for the sole purpose of obtaining delivery and possession of the said ship; and that the company will take such steps as may be advised to recover repayment of such sum as may be so paid, or any part thereof, as also such * 340 damages as the said company * may have sustained, or may hereafter sustain, by reason of your retention of and refusal to deliver up the said ship." The account thereon demanded

[1] The reasonableness of this sum, as a charge, if the company was liable to any, was admitted.

amounted to 9515*l.* 8*s.* 4*d.*, which, after discount taken off, was reduced to 8816*l.* 15*s.* 2*d.* This sum comprised a charge of "Dock dues, 27th November to 29th December, 27 at 21*l.*, 567*l.*" The payment was made under a protest, repeating the words of the letter of the 22d December. The ship was actually given up to the agent of the directors on the 24th December. An action, in the form of money had and received, was, in accordance with the notice in the protest, brought against Messrs. Somes. The facts were stated in a case, and the Court was to have power to draw all such inferences of fact as to it might seem fit. In Trinity term, 1858, the Court of Queen's Bench gave judgment thereon for the plaintiffs.[1] The defendants took the case into the Court of Exchequer Chamber, where the judgment was affirmed.[2] Error was brought on this judgment to this House.

Mr. Montagu Smith and *Mr. T. Jones* for the plaintiffs in error. —First, there is here evidence of a contract to pay for the use of the dock. From the first, the respondents knew that there was to be a special charge of this sort. In the course of the correspondence, the letter of the 29th October announced that in a few days the vessel would be fit to go out of dock, and on the 13th November, Mr. Preston, on behalf of Messrs. Somes, wrote, "I have some ships now waiting for the large dock." On the 14th November, Mr. Wilson proposed that the ship should be allowed to go to the Victoria Docks, but as the terms on which that was * to be * 341 allowed could not be entertained by Messrs. Somes, their answer was that that could not be done, but they added, "The ship is occupying our dock to no purpose, we must therefore beg the favour of an early settlement."

The directors, therefore, had ample notice that the dock room was valuable, and that the occupation of it must constitute a subject of charge. The continued occupation of the dock was the fault of the ship-owners. Their continuing to occupy it by leaving their vessel there must consequently be treated as putting them under the liability of paying for such occupation. And this becomes all the stronger from the distinct notice given in the letter of the 25th November that the charge would be 21*l.* a day; and, in fact, that charge was begun to be made two days afterwards.

[1] Ellis, B. & E. 353.

[2] Id. 357.

The mere protest against the charge, when the person protesting does the very act which gives rise to the charge, amounts to nothing. It was a reasonable inference of fact that there was to be a payment for the use of the dock as long as the ship remained there. To make the shipwrights wrongdoers, the sum due for the work should have been tendered, and the ship demanded. [LORD WENSLEYDALE. — If a tailor makes a suit of clothes, the customer is to pay for them; but suppose he does not pay, and the tailor keeps them in the shop, is the customer to pay for their being kept there?] Yes, if the customer was informed from the first that the occupation of the shop by the clothes was the subject of a charge. The shipwrights had undoubtedly a lien upon this vessel for payment for the repairs done; *Scarfe* v. *Morgan*.[1] It was the duty of the owners to take away the ship when the work was finished, and as they did not think fit to perform that duty, knowing at * 342 the same time * that the occupation of the dock was a subject of charge, they must be deemed to have entered into an implied contract to pay that charge for whatever time they left the vessel unnecessarily occupying the dock. The payment is made under that implied contract, and it cannot be recovered back. Lord Campbell[2] said, that even supposing a wharfinger might claim a continuation of the warehouse rent during the time he detained goods in the exercise of his right of lien, still there could be no such claim here, "as there was to be no separate payment for the use of the dock while the ship was under repair." That was a complete mistake; there was a separate item mentioned in the very first estimate, in which it was said, "the use of the graving dock would be from one hundred and twenty to one hundred and fifty guineas," and which was charged, and the charge not disputed, at 150*l*. That mistake, being one main ground of the judgment, impeaches the judgment itself. If nothing else had been said, there would from that estimate alone have arisen a strong inference that the party using the dock, whether before or after the repairs had been completed, thereby entered into an implied *assumpsit* to pay for its use. An express consent to a charge is not necessary to raise an *assumpsit;* the law will imply it in many cases, as for instance, in the case of a husband for necessaries supplied to the wife. Here, too, there was a responsibility on the party keeping

[1] 4 M. & W. 270.

[2] 1 Ellis, B. & E. 365.

the chattel to keep it in safety, and such a responsibility cannot exist without an accompanying title to compensation. In *The King* v. *Humphrey*,[1] such a claim as this was allowed even against the Crown.

Mr. Bovill and *Mr. Honyman*, for the defendants in error, were not heard.

* LORD CRANWORTH, after stating the case, said.—It was * 343 admitted, that although, where goods are delivered to have any work done upon them, and of course, among other things, a ship to have great repairs done upon it, the person doing those repairs has a lien upon the goods for the amount of the sum charged; but that is confined to a lien for the amount of that sum, and the party doing the repairs cannot add to that lien a charge for the use of his premises while keeping the goods (in this case the ship), not for the benefit of the ship-owner, but for his own. It must be taken to be now decided, that at common law there is no right to such a demand; and the question, therefore, to be considered here is this: Do the letters which are in evidence, and which constitute part of the case, show that there was a special contract to give such a lien?

Now that is attempted to be deduced mainly from the letter of the 25th August, which gives a sort of rough estimate, and then states, "the cost of use of graving dock for the job will be from one hundred and twenty to one hundred and fifty guineas;" and farther, from a letter written on the 25th of November, after the repairs had been done, in which Messrs. Somes, the persons who had done the repairs, state, "We also give you notice, that we shall charge the owners of the ship 21*l.* per diem for the hire of our dry dock from the time our account was delivered." However, they modify that afterwards; they do not charge it from the time the account was delivered, but charge it from the time when this notice had been given.

It is admitted that that sum would not have been an unreasonable sum, if it was a matter in respect of which such a lien could be claimed; but, first, the Court of Queen's Bench unanimously, and afterwards the Court of Exchequer Chamber unanimously

[1] M'Clel. & Y. 173.

* 344 held, that there was no * such contract to be inferred from any thing that had passed between the parties; giving, however, no opinion as to what would have been the right of Messrs. Somes if they had claimed no lien, but had said to the owners of the ship when the repairs were completed, "Your ship is fit to be taken away; it encumbers our dock, and you must take it away immediately." If, after that, the ship-owners had not taken it away, but had left it an unreasonable time, namely, twenty-seven days occupying the dock, neither the Court of Queen's Bench nor the Court of Exchequer Chamber has expressed an opinion as to whether there might not have been, by natural inference, an obligation on the part of the owners of the ship to pay a reasonable sum for the use of the dock for the time it was so improperly left there. But the short question is only this, whether Messrs. Somes retaining the ship, not for the benefit of the owners of the ship, but for their own benefit, in order the better to enforce the payment of their demand, could then say, "We will add our demand for the use of the dock during that time to our lien for the repairs." The two Courts held, and, as I think, correctly held, that they had no such right.

But then, my Lords, a point has been raised here, which, if raised in the Court below, does not appear in the report of the judgment: whether, supposing Messrs. Somes had no right to add to their lien this extra claim of 567*l.* for the use of their dock, the ship-owners could, after paying that demand, seek to recover it back again, even though notice of their intention to do so had preceded and accompanied the payment; and whether, when there was an improper claim made, they ought not themselves to have found what was the right sum, and to have tendered that in order to make Messrs. Somes (as it was called in the argument * 345 at the bar) wrongdoers. In my opinion, Messrs. * Somes must, for this purpose, be considered wrongdoers from the very moment when they said, We will not give you up your ship till you pay something *ultra* that which you are bound to pay. It does not lie in their mouths to say, that it was wrong on the part of the ship-owners to pay a sum demanded by themselves, but which they had no right to demand. It is impossible so to contend. This point does not seem to me to vary the case, and I shall therefore humbly move your Lordships, that the judgment of the Court below be affirmed.

LORD WENSLEYDALE.—My Lords, I am entirely of the same opinion. Two principal points have been made in this case. The first is, whether if a person, who has a lien upon any chattel, chooses to keep it for the purpose of enforcing his lien, he can make any claim against the proprietor of that chattel for so keeping it. No authority can be found affirming such a proposition, and I am clearly of opinion that no person has, by law, a right to add to his lien upon a chattel a charge for keeping it till the debt is paid; that is, in truth, a charge for keeping it for his own benefit, not for the benefit of the person whose chattel is in his possession. That was the opinion of all the Judges of the Courts below, and I think their opinion is perfectly right.

The second point which has been made, is, that from the circumstances of this case there is a contract to pay, not merely for the repairs of the ship, but a contract to pay for the hire of the dock for so long a time as the vessel should be there. Now, we are at liberty to draw such inferences as we think ought to be drawn from the facts, and I am clearly of opinion that no such inference can be drawn in this case.

The only foundation for it is, that after Messrs. Somes * sent this estimate for the necessary repairs of the ship, * 346 amounting to 4296*l.*, the company sent a request that they would give the particulars of what they would charge for each article. The company's agent writes to say, "Your calculations to repair the ship 'British Empire,' and Mr. Preston's letter, dated 16th, have been duly laid before the directors, when the suggestion of Mr. Preston not to repair the ship by contract was duly considered. They now request me to ascertain at what price you would furnish the materials we should require to complete the repairs, viz., pitch pine, yellow pine, American elm, per cubic feet, oakum and pitch per cwt., iron work," and so forth; and "graving dock charges, when you can take her in, depth of water next week." In answer to that inquiry, a letter was written by Messrs. Somes, from which it is said there is to be implied a demand on the part of Messrs. Somes, and a consequent contract for the hire of the dock, independently of the charge for the repairing job, for so long a time as the ship shall remain in the dock. Now, I think it is perfectly clear that that letter can imply no such contract; the answer to that inquiry states, in detail, the price of American red elm, and so on, and then it concludes thus: "The cost of using graving

dock for the job will be from one hundred and twenty to one hundred and fifty guineas;" that is to say, we cannot calculate precisely the length of time that it will require to use the dock for making the repairs, and therefore we make a sort of calculation, and the gross sum it will probably cost will be from one hundred and twenty to one hundred and fifty guineas; there is no statement that the owners are to pay 21*l.* a day for the time that the vessel shall remain there; and it would be quite absurd that if a person employs another to repair a ship, he should be considered as undertaking to pay so much a day for whatever length of time may be comsumed in making the repairs; there is nothing in any
* 347 part of the * correspondence that leads to that conclusion.

I am, therefore, clearly of opinion that there is not made out here an agreement on the part of the company to pay Messrs. Somes the cost of the hire of the graving dock.

Then it was objected, that there was no particular time at which it can be said that Messrs. Somes were wrongdoers in refusing to deliver up the vessel. But what are the facts here? [His Lordship gave a summary of them.] The additional sum thus charged and paid under protest includes the sum of 567*l.*, to which Messrs. Somes had no right by common law, and no right by contract to demand. They became wrongdoers by that act. Therefore, I am clearly of opinion, that in this case they have made a demand, which they had no right to make, for keeping possession of the ship till their charge for the dock hire was paid; they have, by these means, obtained money which they had no right to obtain, and consequently an action for money had and received will lie, and the ship-owners are entitled to a verdict.

LORD CHELMSFORD entirely agreed.

Judgment of the Court of Exchequer Chamber affirmed, with costs.

Lords' Journals, 22 May, 1860.

*ROWBOTHAM AND OTHERS v. WILSON. *348

1860. June 8, 11, 19.

HENRY ROWBOTHAM, and others, *Plaintiffs in Error.*
WILLIAM WILSON, *Defendant in Error.*[1]

Land. Surface. Support to Minerals. House. Grant. Release.

Primâ Facie, the owner of land is entitled to the surface itself, and all below it, *ex jure naturæ;* those who seek to derogate from that right must do so by virtue of some grant or conveyance.

The rights of the grantee of the minerals depend on the term of the deed by which they are conveyed. Under a grant of minerals, a power to get them is a necessary incident.

In 1770, a private Act of Parliament was passed to provide for the allotment of commons and commonable lands, &c. These lands were described as having mines under the surface. Commissioners were appointed to allot (having due regard to the mines) according to the rights of the various persons interested in the lands, some of which were divided into small parcels. The Commissioners, by their award, allotted the lands, so that some of the mines allotted to A. were situated under portions of the land allotted to B. The persons interested executed this award, which (reciting that this mode of allotment had been necessary) contained a clause, declaring that the proprietors agreed with each other, and their heirs, that the lands so allotted should be lawfully held and enjoyed by the allottees without molestation, and without any mine owner being subject to any action for damages on account of working and getting the mines, or by reason that the lands might be "rendered uneven and less commodious to the occupiers thereof, or by sinking in hollows, and being otherwise defaced and injured where such mines shall be worked . . . the several proprietors having agreed with each other, and being willing and desirous to accept their respective allotments in their several situations hereinbefore declared, subject to any inconvenience or incumbrance which may arise from the cause aforesaid." The mines were worked by A., his assignee, and the surface of the land thereby (but without negligence) injured: —

Held, that whatever is the general right in the surface to support, this clause in the award operated as a grant of a right to disturb the surface of the land, and B., therefore, could not maintain an action for damage on that account.

Quære. Whether this clause could operate as a release of the right to support?

The circumstance that (some years after the award, but many more than twenty years before the injury complained of) houses were erected on the land was held not to make any difference with regard to the relative rights of the parties under the award.

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[1] Backhouse v. Bonomi, 9 H. L. Cas. 503; Hammersmith, &c., R. Co. v. Brand, Law Rep. 4 H. L. 183; Duke of Buccleuch v. Wakefield, Law Rep. 4 H. L. 384, 399.

* 349 * DANIEL ROWBOTHAM (since deceased, and now represented by the plaintiffs in error as his executors) was reversioner in fee, under mesne conveyances from one Samuel Pears, of certain ancient houses and surface land situated in the parish of Bedworth, in the county of Warwick. He brought an action against the defendant Wilson, who claimed as representative of one Henry Howlette, an allottee of coal mines, to recover damages for injury done to his land and houses by the working of those mines. By order of the Court of Queen's Bench, a case was stated. The case set forth that in the 9 Geo. 3,[1] an Act was passed

[1] By that Act, c. 101, which recited that there were in the parish of Bedworth "certain common fields, common grounds, and commonable lands," of which certain persons therein named were owners, and that "the property in the lands, &c., lies intermixed and dispersed in small parcels," remote from the houses of the owners, which had been found inconvenient to them, it was stated that they were "desirous that the said lands and grounds may be specifically allotted amongst them in severalty, according to their respective rights and interests." Commissioners were appointed. They were authorised to make a survey, and, "after the survey," to "divide, ascertain, and allot the said common fields, common grounds, and commonable lands and premises hereby intended to be inclosed," among the several persons "entitled to or interested therein, either in right of soil or in any other right or interest whatsoever . . . with a just regard to the quality, convenience, and contiguity of situation, as well as to the quantity of the lands to be assigned to each proprietor, and with a just regard to any mines or delphs of coal, lime, or stone supposed to be under the same, but subject, nevertheless, to the rules, orders, and directions by this Act prescribed," &c.

"And whereas, there are lands supposed to have mines under them, and on that account the proprietors may be desirous of retaining their property therein, such of the lands of the proprietors as the Commissioners shall adjudge to have any valuable mines of coal, &c., under them, shall be allotted and set out together, by metes and bounds, in distinct lots, unto or for such of the proprietors respectively as shall desire the same, provided such desire shall be signified by writing, &c.; or otherwise that there shall be set out for such proprietors other lands under which there shall be supposed to lie mines of equal value to those which they were respectively possessed of before the passing of this Act; and the said Commissioners, in allotting the said mine lands, shall make just allowances between such of them, the delphs whereof remain entire and unbroken, and such of them which have heretofore been open and in part worked.

"When the said Commissioners shall have completed and finished the partitions and allotments of the said open and common fields, common grounds, commonable lands and premises, according to the tenor, true intent, and meaning of this Act, they shall draw up an award, which shall express the quantity of acres, &c., contained in the said common fields, common grounds, commonable lands and premises so intended to be inclosed, and the quantity of each and every part

for * dividing and inclosing the common fields, &c., of Bed- * 350
worth, in the county of Warwick, and Commissioners were appointed to carry that Act into effect. On the 21st June, 1770, the Commissioners made their award, by which (among other things) they allotted certain lands to one Henry Howlette. "And as to the mines on the estate of H. Howlette previous to the inclosure thereof, the same not having been requested to be set out by metes and bounds, we do assign, appoint, and allot unto the said H. Howlette, in lieu thereof, all the mines of coal and limestone under the several allotments of land before made to him; and also all the mines of coal under the allotments to Samuel Pears; and also all the mines of coal under the turnpike road, so far as the same ranges with the outlines of his allotment on Beasley's Furlong and Race Legs; and also all the mines of coal on another part of the turnpike road, contained between a line ranging * with the north outline of the said estate, and a * 351
parallel line from the south of Sir Roger Newdigate's tenement in Colly Croft, for the breadth of fifty links, on the west side of the turnpike road against the allotment to Samuel Pears, and no more, the residue on the east, against the house of Samuel Pears and Daniel Jackson, being allotted to the said Samuel Pears." And the Commissioners allotted to Pears "all the mines of coal under that part of the turnpike road contained between a line ranging with the south outline of his own home close, and a parallel line drawn from the south end of Sir Roger Newdigate's tenement, opposite to houses of the said Samuel Pears and Daniel Jackson, all situate in Colly Croft aforesaid, for the breadth of thirty-five links on the east side thereof adjoining to the homestead of the said Samuel Pears," which the Commissioners adjudged to be equal in value to the mines he was previously possessed of, without being entitled to any part of the mines under his own allotment of land, which last-mentioned mines was thereby allotted to H. Howlette.

which shall be assigned and allotted to the several parties entitled to and interested in the same, and a description of the situation, buttals, and boundaries of such parcels and allotments respectively, and proper orders and directions for the fencing, &c., and also for making and laying out proper roads, &c., through the same, and such other orders, &c., as shall be necessary, conformable to the tenor and purport of this Act."

The new allotments were to be in bar of old estates, "right of soil, right of common, and other rights, interests, and properties whatsoever in, over, and upon the said common fields," &c.

The award contained the following clause: "And whereas, in order to preserve the convenience of situation of the allotments to the several proprietors interested in the said inclosure and division, it hath been found necessary in some cases to assign the mines under the whole of some particular allotments, and in other cases part of such mines, to different persons than those to whom the allotments of the surface land are awarded, and the several proprietors parties to this award are the only persons interested in the disposal of land and mines under such circumstances, which said proprietors, parties hereto, do by their sealing and exe-
* 352 cuting these presents,[1] testify their acceptance * of their respective allotments in manner as the same are allotted to them as aforesaid, and do for themselves severally and respectively, and for their several and respective heirs, executors, administrators, successors, and assigns, utterly disclaim, release, and disavow all right, title, interest, claim, and demand, of, in, or to any of the mines under their several allotments, except such or such part thereof only as are hereinbefore particularly mentioned and described to be allotted to each of them; and the same proprietors do hereby for themselves severally and respectively, for their several and respective heirs, executors, administrators, successors, and assigns, covenant, promise, and agree, to and with each other, and the heirs, executors, administrators, successors, and assigns of each other, that the said mines so allotted under the circumstances aforesaid, shall or lawfully may for ever after be held and enjoyed by the respective persons to whom the same are assigned according to the true intent and meaning of this award, and by them and every of them be worked and gotten accordingly, without any molestation, denial, or interruption of any other person or persons parties to these presents, and those claiming under them respectively, who for the time being are or may be owner or owners of the surface of the lands under which such mines are situate, and without being subject or liable to any action or actions for damage on account of working and getting the said mines, for or by reason that the surface of the lands aforesaid may be rendered uneven and less commodious to the occupiers thereof, by sinking in hollows or being otherwise defaced and injured where such mines shall be worked; the said several proprietors, parties to these

[1] The proprietors of land generally executed this award. Pears did so, but Howlette did not.

presents and interested in the disposal of lands and mines under the circumstances aforesaid, having agreed with each other and being willing and desirous to accept their respective allotments in their several situations hereinbefore * declared, * 353 subject nevertheless to any inconvenience or incumbrance which may arise from the cause aforesaid; so nevertheless as that nothing herein contained shall extend or be construed to extend to authorise or enable any of the parties for the time being entitled to the said mines, to sink pits on allotments under which the same are situate, for the purpose of working the said mines, without the consent of the then owners of the surface of the same allotments previously obtained, or in any manner to dig or break the said surface without the like consent." The houses which the plaintiff alleged to have been injured had not been erected till after the award, but were more than twenty years old at the time of committing the grievances. The case stated that the mines had been worked with care and skill, and without negligence.

On the 7th June, 1856, the Court gave judgment for the defendant,[1] which judgment was, on the 14th July, 1857, affirmed by the Court of Exchequer Chamber.[2] The present proceeding in error was then taken.

Mr. Serjeant Hayes, and *Mr. Spinks*, for the plaintiff in error. — Some of the Judges in the Court below were of opinion that there was no express nor implied authority to do what was done here. That is one of the questions now raised: The authority of the Commissioners depended entirely on the Act of Parliament. They were bound strictly to follow the Act; they have not done so, for they had no authority to separate the allotments of the lands from the mines below them, and to give to the allottee of the mines a right to work them so as to injure the surface of the land. By so doing they exceeded their authority, and therefore * their award is bad; *Casamajor* v. *Strode*,[3] *The King* v. * 354 *Washbrook*.[4]

It is contended on the other side that the clause in the award is a covenant. Even if so, the defendant cannot take advantage of it. The plaintiff's predecessor executed it; the defendant's predecessor did not; he was therefore at liberty to contest the award

[1] 6 Ellis & B. 593.
[2] 8 Ellis & B. 123.
[3] 2 Mylne & K. 706.
[4] 4 B. & C. 732.

till the lapse of twenty years had made it valid. He merely accepted the land and the title to that land which the award gave him, and nothing but what the law necessarily implies will follow such an acceptance. The supposed covenant will not bind the present possessor; it is a mere personal covenant which does not run with the land, but is a mere covenant, as in *Keppell* v. *Bailey*,[1] not to do a certain thing; it is a covenant not to sue, and it is binding only on the parties who mutually executed it. It does not bind the assignee of the covenantor; *Spencer's Case*.[2]

Nor is this clause in the award a grant of the right to work the mines, and to work them even though such working may injure the surface of the land. In the first place, there are no words of grant in the award.

[LORD WENSLEYDALE. — There are no particular words necessary for that purpose.]

In the next, such a grant is void, for it is destructive of the thing itself, the land, out of which the grant is supposed to be made. Besides, at the time of executing the award, Pears had no estate in the allotments, and so had no power to make them the subject of a grant; nor at that time had Howlette any estate in them, nor did he execute the award. There can, therefore, be no estoppel here, for an estoppel must be mutual.

[LORD WENSLEYDALE. — Pears took possession under the
* 355 * award, and by it entered into a covenant. That operates as a grant.]

If a man has no interest he cannot make a grant; though he may bind his future interests by positive stipulations, still they will not amount to a grant. Is there any thing here granted, and is there any grantor? Assuming, for the sake of argument, that the award is good, Pears had only a title to the surface, and with it a right to the support of the adjacent strata. That right is not in itself grantable, for it is an inseparable incident to the land, and therefore cannot be granted away from it. *Sheppard's Touchstone*.[3] There was, therefore, nothing to grant.

It is a settled principle of law that a man is entitled, *ex jure naturæ*, to support for his land from any thing below the surface, from the subjacent strata, and also from the adjoining land.

[LORD WENSLEYDALE. — In all such cases, the origin of the right

[1] 2 Mylne & K. 517.
[2] 1 Smith's Lead. Cas. 30, and notes, 59–63.
[3] C. 12, p, 239.

is supposed to be in a grant made when the lands which had belonged to one proprietor were by him divided between two or more other persons.]

The case of *Humphries* v. *Brogden*[1] is upon this point decisive in favour of the plaintiff. It was there held that of common right the owner of the surface is entitled to the support of the subjacent strata, and that if the owner of the minerals removes them, it is his duty to leave sufficient support for the surface in its natural state. This right of the surface to support is not a mere easement, which is something accessorial to the land, but is one of the ordinary common-law rights of property. It is said by Mr. Justice Erle, in *Bonomi* v. *Backhouse*,[2] that "the right to support is one of the ordinary rights of property, analogous to the right to a natural stream incidental to all land, and not an easement * or right acquired by grant or otherwise;" and that opin- * 356 ion was adopted in the judgment of the Court of Exchequer Chamber.[3] As to the construction of the alleged covenant, it is clear that it was not a release of a right of action, for no cause of action had then arisen or might ever arise. It was the intention of the Commissioners that Pears, in taking the surface, took it with this natural right to support; the clause to prevent him from suing, which is so much relied on by the other side for another purpose, proves that intention, since it acknowledges that, without a covenant not to sue, he would have had the right to sue, if by the act of the mine-owner the support to his land was taken away.

Finally, the houses erected by the plaintiff have acquired by lapse of time a title to support.

Mr. M. Smith, and *Mr. Field*, for the defendant in error.—The right of support here contended for is not a natural right applicable at all times and in all cases. *Humphries* v. *Brogden*[4] does not lay down that proposition. In this very case, Lord Campbell, referring to that decision, said,[5] "We there expressly guarded ourselves against the supposition that we intended to lay down any rule applicable to a case where the *primâ facie* rights and liabilities of the owner of the surface of the land, and of the sub-

[1] 12 Q. B. 739.
[2] Ellis, B. & E. 642. (Now on Error in this House, see 9 H. L. Cas. 503.)
[3] Ellis, B. & E. 654. [4] 12 Q. B. 739. [5] 6 Ellis & B. 602.

jacent strata, are varied by the production of title-deeds, or by other evidence." But whatever may be the right, it has here been parted with. The presumption here is, that as there is a grant of the mines, there is a grant of the right to use them. The
* 357 agreement here is clear, and manifests the real * intention of the parties, and they accept their allotments under the conditions and liabilities and covenants contained in the award. With the full knowledge that the surface would sink, they made this agreement. Putting the houses on the land afterwards cannot affect it. This is much more than a mere covenant not to sue.

[LORD BROUGHAM.—Suppose it a renunciation of the right to support necessary to preserve evenness in the surface, so far as the ordinary use of land for gardening purposes, for instance, would require: does that imply a like renunciation for building purposes? In the former the injury might be inconvenient, in the latter it might be fatal.]

That depends on the intention of the parties, as manifested in the deed. A man may grant away the beneficial use of the surface of his land. He may grant a right of way over his land, and he may grant such a right as this, and he may do so, either by grant or release; *Sheppard's Touchstone*.[1] It is not important that the word grant is not used, it being the intention of the parties that such should be the effect of the instrument; *Goodtitle* v. *Bailey*,[2] *Denison* v. *Holliday*;[3] and though the words are words of agreement only, yet if such is the intention of the parties, they may operate as a grant; Gale on Easements,[4] *Northam* v. *Hurley*.[5] Words which in themselves appear to be only words of reservation, may operate as a grant; *Wickham* v. *Hawker*.[6] A deed of conveyance may operate as a covenant to stand seised to uses; *Roe* v. *Tranmer*.[7]

Here was an Act of Parliament dealing with many small
* 358 * tenements. The Commissioners had authority to grant mines, and also to grant the power to work them; but if so they had authority to grant what was reasonable and necessary

[1] 82. [2] Cowp. 597. [3] 1 H. & N. 631, 3 Id. 670.
[4] P. 46, quoting Holms v. Seller, 3 Lev. 305. See Allan v. Gomme, 3 Per. & D. 581. [5] 1 Ellis & B. 665.
[6] 7 M. & W. 63. See Ewart v. Graham, 7 H. L. Cas. 331.
[7] 2 Wils. 75.

for the exercise of that power. A grant of this kind was reasonable, and therefore must be held good; *Rogers* v. *Taylor*.[1] Some of these tenements consisted only of a quarter of an acre of land. If the Commissioners had no power to disannex the mines from the surface, there would be an end of the power they undoubtedly possessed to grant the right to work the mines, for it might be impossible for each owner of a small portion of surface-land to sink shafts, and work the mines under his land. It must therefore have been the intention of the Legislature that the Commissioners should have the power to do what they have done. The very necessity of the thing showed that the Legislature intended to give them this power.

The case of *Keppell* v. *Bailey*[2] does not apply here, for this is a grant of something arising out of the land itself, and inseparably connected with it, while there it was only a personal covenant to employ the produce of the land in a certain manner.

Mr. Serjeant Hayes replied.

LORD WENSLEYDALE, after stating the facts, said:—The question turns upon the construction of the Act of Parliament, and the award made under it.

It is stated in the case, that the parcels to be allotted were very small, and that the surface of the land was allotted to one set of proprietors, and the coals below to another set. Then there is executed a covenant by all the parties to the award. (His Lordship read it. See ante, p. 351.)

* The Court of Queen's Bench was of opinion upon this * 359 case, that the plaintiff was without remedy, and that the defendant was entitled to judgment. A writ of error was brought to the Court of Exchequer Chamber; the learned Judges there were divided in opinion, the majority affirming the judgment of the Court of Queen's Bench; the minority consisted of Mr. Justice Creswell and Mr. Baron Watson, who were of opinion that this was merely a covenant, and that as a covenant it could not operate as a grant, and also that as a covenant it could not operate as a release of damage, because damage had not been sustained.

I am of opinion that the judgment of the Court of Exchequer

[1] 1 H. & N. 706. [2] 2 Mylne & K. 517.

Chamber affirming that of the Court of Queen's Bench is right, and I advise your Lordships to affirm it.

It is unnecessary to discuss several of the questions made in the elaborate arguments at your Lordships' bar.

Whether the right to the support given by the land below to the land of the owner of the surface, when the strata belong to different persons, is properly to be called "an easement," as it is by Mr. Gale in his excellent Treatise on Easements a "natural easement," or whether it is to be termed a "*right*" *ex jure naturæ* to that support, or whether the owner of the surface has merely a right to enjoy his own land in its natural state and condition, with a right of action against the owner of the land adjoining or subjacent, when the act of his neighbour does him an injury, are questions immaterial, as it appears to me, to the decision of this case; though the last proposition appears to be fully established by the judgment of the Court of Exchequer Chamber in the * 360 case of *Bonomi* v. *Backhouse*.[1] And it was held, therefore, that the Statute of Limitations does not begin to run until the damage is sustained.

There is no doubt that *primâ facie* the owner of the surface is entitled to the surface itself and all below it *ex jure naturæ;* and those who claim the property in the minerals below, or any interest in them, must do so by some grant from or conveyance by him, or it may be from the Crown as suggested by Lord Campbell in the case of *Humphries* v. *Brogden*.[2]

The rights of the grantee to the minerals, by whomsoever granted, must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed. *Primâ facie*, it must be presumed that the minerals are to be enjoyed, and, therefore, that a power to get them must also be granted or reserved, as a necessary incident. It is one of the cases put by Sheppard (Touchstone, 5 chap. 89), in illustration of the maxim, "*Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit*," that, by grant of mines is granted the power to dig them. A similar presumption, *primâ facie*, arises, that the owner of the mines is not to injure the owner of the soil above by getting them, if it can be avoided.

But it rarely happens that these mutual rights are not precisely

[1] Ellis, B. & E. 622, 646. [2] 12 Q. B. 739.

ascertained and settled by the deed by which the right to the mines is acquired; and, then, the only question would be as to the construction of that deed, which may vary in each case. The question to be decided in this case is, what sort of right the defendant had, upon the facts stated in the case reserved, to get and take away the coals under the plaintiff's land.

The origin of the plaintiff's right to the land, and of the * defendant's right to get the coals, is the award made, in * 361 1770, under the Private Inclosure Act for the Common Fields of Bedworth. A larger extent of surface, no doubt, was given to the allottee of the surface, as the compensation for the minerals not being given to him. It is clear that the persons under whom the plaintiff and defendant respectively claim, took with full knowledge that the one was intended to have a very large power of working the mines, and the other was to have the surface, subject to that power, and that each of the parties to the suit had notice of their respective titles by the award itself. The plaintiff's case is, therefore, not a very equitable one; but the question still is, whether that power and limitation were legally annexed to the respective rights or not.

I am clearly of opinion that they were, whether the award be considered valid or not.

The objection to the validity of the award is, that the Commissioners had no power to separate, in any case, the minerals from the surface. If they had the power (and I think they had), then the award of the surface of the particular allotment to Pears, and of the coal under it to Howlette, was valid; and, of necessity, the Commissioners could give to the latter, for the enjoyment of his allotment, the power to get the coal. They have done so by their award; and though Pears is made to covenant, at the same time, as to the manner in which the power is to be exercised, it is the act of the Commissioners also, for it is evident that they intended it to be done, and no precise words are necessary. It may be that they doubted of their powers, and so added the covenant.

On the supposition, therefore, that the award is valid, Howlette obtained the right to get the coal in a manner which would render the surface uneven and less commodious to the occupier. And supposing this power is not * to be considered as given * 362 by the act of the Commissioners, but only by the contract of the parties, Pears' covenant, he being seised in fee by virtue of

the award, would certainly operate as a grant, by him, to Howlette (who, at the same instant, took the fee simple in the mines), of the power to get the minerals, and to disturb the surface of his own land for that purpose by winning the mines below from some adjoining land or bed of coal.

I do not feel any doubt that this was the proper subject of a grant, as it affected the land of the grantor; it was a grant of the right to disturb the soil from below, and to alter the position of the surface, and is analogous to the grant of a right to damage the surface by a way over it; and it was admitted, at your Lordships' bar, that there is no authority to the contrary. It is undoubted law, that no particular words are necessary to a grant; and any words which clearly show the intention to give an easement, which is by law grantable, are sufficient to effect that purpose.

If the words could only be read as amounting to a covenant, it must be admitted that such a covenant would not affect the land in the hands of the assignee of the covenantor; but if they amount to a grant, the grant would be unquestionably good, and bind the subsequent owners of the surface. Therefore, if the award be valid, the plaintiff, as assignee of the surface, would be bound either by the order of the Commissioners, or by the grant.

The reason why I think the Commissioners had the power to allot the surface to one, and the mines below to another, is because the words of the Act do not necessarily limit the division into allotments of the whole interest in the land, in separate entire portions of the surface and minerals together. There is nothing inconsistent with the terms of the Act in allotting the surface in some portions of land to one, and the minerals under these por-
*363 tions to another. *The Act of Parliament recites, that the property lies intermixed and dispersed in small parcels, and small parcels would have, probably, to be assigned to each proprietor; and it might be, as was suggested by Mr. Field, in his able argument at the bar, out of question for each owner to win the coals under his own allotment by sinking a shaft in it, and it would be most convenient for all parties to have the coals assigned in such cases to a neighboring proprietor, and more of the surface given to the owner, whose coal was taken away. The private Act of Parliament is really no more than an agreement between the parties to it, sanctioned by the Legislature; and, in order to construe that agreement, we may look at the surrounding circum-

stances at the date of it. Add to this, the Act and award having been acted upon for ninety years, every intendment must be made which would give it validity.

These considerations lead me to the opinion that the Commissioners had the power, for the general convenience, which they believed they had, and which they exercised, to give portions of the surface to one person, and the mines under each portion to another, and that the award, therefore, is valid.

The opinion, however, of the majority of the Judges in the Courts below, seems to have been that the award was bad. But supposing that to be so, and that Pears did not take a legal right to the land, nor Howlette a legal title to the mines by the award, I still think that the defendant is entitled to the verdict and judgment.

It might, perhaps, be enough to say, that after ninety years' enjoyment a legal right to the surface-land ought to be presumed in those under whom the plaintiff claims; and also, a legal right to the minerals below, with a right to get them, by a legal grant, in those under whom the defendant claims; and if there was such a right, * on the finding in the case, it could not * 364 be exercised without rendering the surface uneven, from the peculiar nature of the coal, and the incapability to support the land above by artificial means. The right to get involved, therefore, of necessity, the right to withdraw a certain quantity of support from the land above, and so to do all the damage which has been done, for it is found that the defendant's workings were carried on with care and skill, and without any negligence.

I do not think, however, that it is necessary to have recourse to this presumption. If the Commissioners had no power to award the surface to one person and the minerals to another, it would follow that the award was totally void; but Pears would be still bound by the deed which he executed, which would operate as a grant of the right to win the coals in such a manner as might injure the superjacent land. He would not be estopped from saying that he was not at the time the owner of the surface, because his defect of title appeared upon the same instrument, and so the estoppel would be avoided, and he would be in the same situation as if, without any legal right, but at the same time fully believing that he had it, he had executed to another person, a grant of a right to get the minerals under a particular close, and so to dis-

this is the correct view. It must be borne in mind that Pears had no right, either by the award or as attached to his ownership, which was capable of being granted and transferred to another. It was a right, inherent in the land, to support from the subjacent land, which of course would pass with the land itself, but which could not possess a separate existence.

I was disposed to think that it was a right which might be relinquished to the owner of the mine, and that the covenant might therefore be used as a release. But I am satisfied that the view taken by my noble and learned friend, Lord Wensleydale, founded upon the nature of the right as explained in the case of *Bonomi* v. *Backhouse*, is correct, and that it is not such a right as can be the subject of a release. But although the thing itself, namely, the right to support cannot pass by grant, nor be extinguished by release, yet the covenant amounts to a grant of license to do acts which may be completely destructive of that right; and being by deed, and therefore presumed to be founded upon good and sufficient consideration, it is irrevocable and binding upon all * 368 who claim the surface-land * from Pears. The effect of Pears' deed is, not to transfer to Howlette any right or interest in the coal which might serve as a support to the surface-land, but it operates as the grant of a right to Howlette, his heirs and assigns, to work the mines without molestation, denial, or interruption, even to the taking away this support, and defacing and injuring the surface of the land, which, without such a grant, could not lawfully have been done.

For these reasons I agree with my noble and learned friends that the judgment of the Exchequer Chamber is right, and ought to be affirmed.

LORD KINGSDOWN. — I quite concur in the judgment which has been given.

THE LORD CHANCELLOR (LORD CAMPBELL). — My Lords, having been prevented by public business elsewhere from hearing the argument in this case, of course I give no opinion. I may perhaps, observe, that the judgment now given being in accordance with that of the Court over which I formerly presided, I entirely concur in it.

Judgment affirmed with costs.

Lords' Journals, 19th June, 1860.

* THE ATTORNEY-GENERAL v. THE DEAN AND CANONS OF WINDSOR. * 369

1860. March 12, 13, 14, 15, 16, 19, 20, 21; May 23.

THE ATTORNEY-GENERAL, *Appellant.*
THE DEAN and CANONS of WINDSOR, *Respondents.*

Decisions of this House. Charity. Surplus. Resulting Trusts to the Crown. The King's Will. Deeds. Costs.

A decision of the House of Lords is as binding upon the House itself as upon any inferior Court. (Per Lord Campbell, Lord Chancellor; *dub.*, Lord Kingsdown.)[1]

And where there is an equal division of opinion among the Lords, and in consequence, the judgment of the Court below stands, the result is the same as to authority as if the Lords had been unanimous in their judgment. (Per Lord Campbell, Lord Chancellor.)

If the income of lands devoted to charitable purposes is apportioned in defined proportions among different objects of charity, each object will, as a rule, subject to the interference of the Court of Chancery in special cases, be entitled to participate in the increase in the same proportions.

So if there is declared an intention to devote the whole to charity, though the particular appropriation may have failed to exhaust the rents, the general declared intention shall prevail, and the whole shall go to charitable uses.

On the other hand, if lands are given to a body, which is itself an object of charity, but given subject to the payment of specific sums to other objects of charity, the increased income will belong to the body to which the lands have been given, and the other objects can claim nothing beyond the specific charges.

All such cases are questions of the intention of the donor, to be determined by the construction to be put on the language he has used.

Henry VIII. directed by his will certain provision to be made for the Dean and Canons of Windsor, and the maintenance of the Poor Knights there. As to the former, he directed that they should provide priests to say masses at his tomb at specified times, and to keep certain obits, and at every obit to give to the poor "in almes ten pounds." And to the latter, he gave 12*d.* a day and a gown of white cloth and a mantle, with an additional payment of a specified sum to the chief of the Poor Knights. Edward VI. made provision for carrying this will into effect. Deeds were executed for granting lands to the Dean and

[1] Beamish v. Beamish, 9 H. L. Cas. 274.

Canons, the Crown reserving to itself a power of directing the distribution of the funds thus provided, and the Dean and Canons covenanting to bestow the rents, to a certain amount, as the Crown should think meet. This power was not exercised in the reign of Edward VI., but in that of Elizabeth a deed was executed, and ordinances were made, directing what sums were to be paid * 370 to the knights, and * what gowns and mantles they were to receive. The deed contained the following declaration: "which said lands and other premises amounting to the said sum of 661*l.* 6*s.* 8*d.*, we will, &c., shall remain to the said Dean and Canons and to their successors for ever; that is to say, for the maintenance of the charges of 430*l.* before declared, and the residue, being 231*l.* 6*s.* 8*d.*, to remain for the vicars and serving priests' wages, when need requireth reparation of the said lands, the officers' fees, and for the relief of the said Dean and Canons, and their successors." There was no provision for reducing these payments in case the rents should fall short of the sum stated. The deed, as found in the Chapter House at Westminster, had the Great Seal attached to it, but was not shown to have been executed by the Dean and Canons; but their muniments contained an unexecuted copy of it, and they entered into possession of the lands and rendered accounts to the Crown, showing, among other things, the regular payment of the sums to the Poor Knights: —

Held, that proof of the execution of this deed by the Dean and Canons was unnecessary; that its provisions were binding on them, and that, on the construction to be given to the intention manifested in the will of Henry VIII., and in this deed, the lands were given beneficially to the Dean and Canons, and the Poor Knights of Windsor were not entitled to a proportional share in the increased value of these lands.

The will of Henry VIII. had no effect in conveying the demesne lands of the Crown,— they were conveyed under the deed of Edward VI.; and after the execution of Elizabeth's deed and ordinances no part of the profits was impressed with any general unspecified charitable trust, and no interest, nor any resulting trust remained in the Crown.

The information having been filed by the Attorney-General upon an address from the House of Commons, no costs were given.

THIS was an *ex officio* information filed by the Attorney-General, in consequence of an address from the House of Commons to Her Majesty. The question intended to be raised was as to the disposition of the increased income (stated to amount to 14,000*l.* a year) now derived from lands granted by Edward VI. for the support of the Dean and Canons and the Poor Knights of Windsor.[1]

Edward III. rebuilt the royal chapel at Windsor, and * 371 * ordained by his letters-patent, in the twenty-second year of his reign, that there should belong to the said chapel twenty-three canons with a custos presiding over them, and

[1] Now, by authority of William IV., designated Military Knights of Windsor.

twenty-four Poor Knights, "impotent of themselves or inclining to poverty, to be perpetually supported of the goods of the said chapel, and for ever to be superadded to the others attending the said chapel under the said warden, there serving Christ; and we have caused them worthily to be received there, as well as the canons and knights and other the ministers of the said chapel as is premised." William of Wykeham, Bishop of Winchester, under the authority of the King, formed a body of statutes for the governance of the college. By the 6th statute it was ordained that "twenty-six veteran knights, not having wherewith to live, these, to the honour of God and St. George, shall have a competent exhibition continually to serve God in prayers." Their election was reserved solely to the sovereign of the order. The 21st statute provided that "every companion of the order upon his first entrance shall give a sum certain according to the eminence of his estate for the support of the canons and poor veteran knights dwelling there." By an Act of Parliament passed in the 22 Edw. 4. (which Act it had been always alleged by the knights was fraudulently obtained by the Dean and Canons from the King), it was recited that the King "had greatly increased the number of ministers now serving Almighty God in the said chapel, and that the possessions given to the Dean and Canons suffice not to sustain all their other charges, and also to bear the charges of the same knights; in consideration whereof, our said Lord the King hath for the said knights otherwise provided;" therefore it was enacted that "the same Dean and Canons and their successors for evermore be utterly quit and discharged from all manner of exhibition or charge of, or for any of the * same knights." In the third * 372 year of Henry VIII. the King obtained from the Dean and Chapter a provision of twenty marks for one Peter Narbonne, a Poor Knight. The indenture then made recited that they were "not bound unto or for the exhibition for any Poor Knight," but expectations were held out that the King would make them some beneficial endowments. These expectations were never fulfilled during the life of the King. About the year 1546, the Dean and Canons agreed to convey to Henry VIII. some of their lands, the manor and parsonage of Ivor and Damarey Court, the rents of which amounted to 160*l.* 2*s.* 4*d.* a year, under a promise of receiving lands of equal value in exchange. This promise was not fulfilled in the lifetime of the King; but by his will, dated 30 De-

cember, 1546, he made many provisions for them, which provisions he in the most solemn manner adjured his successor and executor to carry into effect. One of these directions was, "that as soon as may be after our departure from this world the Dean and Chapter shall have manors, &c., to the yearly value of 600*l.* over all charges made sure to them and their successors for ever upon the conditions hereafter ensuing." Among the other provisions were the following: —

"And for the due and full accomplishment and performance of all other things conteined with the same in the form of an indenture, signed with our own hand, which shall be passed by way of covenant for that purpose between the said Deane and Cannons and our executors, if it pass not between us and the said Dean and Cannons in our liefe; that is to say, the said Dean and Cannons and their successours for ever shall finde two prestes to say masses at the said aulter to be made where we have before appointed our tomb to be made and stand; and also after our decease kepe yerely four solempne obites for us within the said col-
* 373 lege of Windesour, and at every of the same * obites to cause a solempne sermon to be made, and also at every of the said obites to give to poor people in almes tenne poundes.

"And also to give for ever yerely to thirtene poor men, who shall be called Poore Knightes, to every of them twelf pens every daye, and ones in the yere yerely for ever, a long joune of white cloth with the garter upon the brest, embrodered with a sheld and cross of Sainte George within the garter, and a mantel of red cloth, and to such one of the said thirteene Poor Knightes as shall be appointed to be hed and gouvernour of them IIII*li.* VI*s.* VIII*d.* yerely for ever, over and besides the said twelf pennes by the daye.

"And also to cause every Sonday in the yere for ever a sermon to be made for ever at Windesour aforesaid, as in the said indenture and covenant shall be more fully and particularly expressed, willing, charging, and requiring our son Prince Edwarde, all our executours and counsaillors which shall be named hereafter, and all other our heirs and successours which shall be Kinges of this realme, as they will aunswer before Almighty God at the dredful day of judgment, that they and every of them do see that the said indenture and assurance to be made betwene us and the said Dean and Cannons, or between them and our executours, and all thinges therein conteined, may be duly put in execution, and observed and

kept for ever perpetually, according to this our last will and testament."

The Archbishop of Canterbury and the Lord Chancellor, and a great many other eminent persons and councillors of the Privy Council, with "our son Prince Edward," were appointed "executors," and "as they must and shall answer at the day of judgment," they were required "truly and fully to see this my last will performed in all things with as much speed and diligence as may be." In 1547, a meeting of the executors and Privy Councillors, with the Lord Protector *at their head, was * 374 assembled, and a document was drawn up which recited the material parts of the will relating to this matter, and directed that "the Barons of the Exchequer, the King's serjeants, the attorney and solicitor, should deliberately peruse the whole will, and frankly declare their opinions what the executors may lawfully do, and how and in what form the said will may be lawfully executed and performed." This was done, and a special report was afterwards made declaring that the will might be carried into effect, and stating how that might be done.

On the 2d August, 1547, Sir Edward North, then the Chancellor of the Court of Augmentation of the King's Revenues, signed instructions for a conveyance to be made pursuant to the King's will of certain estates which are therein described as of the yearly value of 812*l.* 12*s.* 9*d.*, and which afterwards received the name of the "new dotation." From that sum were to be deducted the following items: first, 160*l.* 2*s.* 4*d.* as compensation for the manor and parsonage of Ivor and Damarey Court, which had been conveyed to the King; and next, 52*l.* 10*s.* 5*d.*, reserved as a yearly rent in lieu of tenths, and to be paid into the Court of Augmentations. These two sums would leave the Dean and Canons exactly 600*l.* a year, the sum mentioned in the will; and they were to be for ever exempted from first fruits and tenths.

The indenture prepared under these instructions bore date 4th August, 1547, and was expressed to be made between King Edward VI. of the first part, the Lord Protector and the executors of the second part, and the Dean and Canons of the third part. It recited the will and other previous proceedings, and granted the lands mentioned in the instructions to the Dean and Canons, who covenanted "to bestow and employ the rents, &c., of so much of the said premises as shall amount to the said yearly value of

* 375 600*l.*, * or of so much thereof as to the said Lord Protector and his co-executors shall be thought meet and convenient, in and about such acts, intents, and purposes as by the King, the Lord Protector and his co-executors, shall be prescribed, limited, and appointed in the said tripartite indenture hereafter to be made" between them.

No other tripartite indenture appears ever to have been made, but letters-patent of the date of 7 October, 1547, were issued, being in substance the same as the indenture already recited. Edward VI. did not appoint any Poor Knights; Queen Mary appointed nine; and Queen Elizabeth appointed four, and thus completed the number up to thirteen.

A deed, to which was attached the Great Seal of England, and annexed to which and forming part of it were certain ordinances made by Queen Elizabeth, and dated 30 August, 1559, was found in the Chapter House at Westminster. A copy of it was in the Hugget collection of MSS. in the British Museum entered in a book called Fryth's Register, which was a compilation of papers relating to the Deans and Canons made by Fryth, who was himself a member of the body. This instrument was described as made between the Queen of the first, and the Dean and Canons of the other part. It recited the previous documents, and that it had been the will of Henry VIII. "to make a special foundation and continuance of thirteen poor men, decayed in wars and such like service of the realm, to be called thirteen Knights of Windsor, to be kept there in a succession;" and went on to declare that "we have therefore by these presents not only set forth and exposed the foundation of the said thirteen Poor Knights, with certain orders and rules for the better government of them, and by them to be observed and kept, but also have likewise by these presents expressed and declared how and in what manner the revenues and profits * 376 of certain manors, lands, * and tenements of the yearly value of 600*l.*, given and assigned to the said Dean and Canons and their successors by our said dear father, shall be bestowed and employed for the maintenance of the said thirteen Poor Knights and otherwise, according to the mind and will of our said most noble father."

It declared that, "Whereas lands mentioned in a schedule thereunto annexed were given to the Dean and Canons for the intent and purpose that the revenues and profits of the same

should for ever be employed and bestowed for the maintenance of thirteen Poor Knights, within the Castle of Windsor, and otherwise in such manner and form as in one book, to such letters-patent and indenture annexed, and signed with the sign manual of the said Queen, is set forth and declared, the said Dean and Canons, for the better observance of the statutes, orders, and rules contained in the said book, did, by such indenture, for themselves and their successors covenant, promise, and grant to and with her said Majesty, her heirs and successors, that they, the Dean, &c., should at all times and for ever distribute, employ, and bestow the rents, &c., of the said manors, &c., in such manner and form as by her said Majesty, in the said book thereunto annexed, was set forth, &c.; and should likewise faithfully observe, &c., all and singular the ordinances, rules, &c., contained in the said book." The book accompanying such indenture declared that, "Our will and pleasure is, that the said Dean and Canons, and their successors, shall, for ever, not only cause these our ordinances and rules, hereafter written, firmly to be observed and kept, but shall also from time to time convert and bestow the rents, issues, and profits of the said manors, lands, &c., to such uses and intents, and in such manner and form, as hereafter is declared." Then followed the rules: "First, we do establish thirteen Poor Knights, * whereof one to be governor of all the resi- * 377 due, by such order, as followeth: the same thirteen to be taken of gentlemen brought to necessity, such as have spent their times in the service of the war, garrisons, or other service of the Prince, having but little or nothing whereupon to live, to be continually chosen by us, our heirs, and successors." Fourth: "The same thirteen knights to have yearly for their liveries, each of them one gown of four yards, of the colour of red, and a mantle of blue or purple cloth, of five yards, at 6*s.* 8*d.* the yard." There were other rules, which are not, however, material to be mentioned. Then came the ordinances "for the continual charges," among which were the following items, relating to the knights: —

	£	s.	d.
"Thirteen knights, at 18*l.* 5*s.* per annum	237	5	–
"The governor of them, above his 18*l.* 5*s.*	3	6	8
"To every of them a gown of red, four yards plain broad cloth in every gown, at 6*s.* the yard . .	16	18	–

	£	s.	d.
"Thirteen arms, embroidered with the garter, to be set upon their left sleeves, at 3*s.* 6*d.* the piece	2	12	–
"Thirteen mantles, plain cloth, blue or purple, every mantle five yards, at 6*s.* 8*d.*	21	13	4
"For making the said gowns and mantles, every gown and mantle at 3*s.* 4*d.*	2	3	4"

The whole amount of the charges was stated at "430*l.* 19*s.* 6*d.*," and the "lands appointed for the said charges" were enumerated, and the sum total of their rents put down at "661*l.* 6*s.* 8*d.*;" and at the end of these lists of charges and of means was a paragraph in these words: "Which said lands and other the premises, amounting to the said sum of 661*l.* 6*s.* 8*d.*, we will and * 378 ordain, and by * these presents declare, shall remain to the said Dean and Canons and to their successors for ever; that is to say, for the maintenance of the charges of 430*l.* before declared, and the residue, being 231*l.* 6*s.* 8*d.*, to remain for the vicars, and serving priests' wages, when need requireth reparation of the said lands, the officers' fees, and for the relief of the said Dean and Canons, and their successors."

This deed contained an averment, that "one part of these premises remaining with the Dean and Canons," was sealed with the Great Seal of England, and that to the "other part thereof, remaining with our said Sovereign Lady, the Dean and Canons had put their common seal." In none of the public offices could there be found a deed executed by the Dean and Canons; and the part to which the Great Seal was attached, was found in the Chapter House at Westminster, and not in the possession of the Dean and Canons. Among the points raised in the case, it was contended that there had not been any complete execution of this deed; and no satisfactory evidence given of its contents. Another point was this: that the Dean and Canons, in their accounts to the Crown, rendered pretty regularly during the reigns of Edward VI. and Mary, and the beginning of the reign of Elizabeth, but then only rendered at long and uncertain intervals, and finally ceasing in the reign of Charles II., had not correctly set forth income and expenditure, so that the Crown had been deceived in its grant. The decision renders farther development of these points immaterial.

The case was heard before the Master of the Rolls, who, in

January, 1858,[1] declared that the Military or Poor Knights had no interest in the surplus, and dismissed the information. This appeal was then brought.

* *The Attorney-General* (*Sir R. Bethell*) and *Sir F. Kelly* * 379
(*Mr. C. J. Selwyn* and *Mr. T. H. Terrell* were with them)
for the appellant. — The grant of the lands in this case (except only such of them as were granted in compensation for others previously surrendered to the Crown) was made, not in the way of bounty, but on a charitable trust. The will of Henry VIII. and the letters-patent of Edward VI. alone govern the disposition of the fund thus created. In the indenture of August, 1547, there is no reservation of power to the Crown to direct any new distribution of the fund inconsistent with the will of Henry VIII., or of that indenture. If, therefore, any such was made by the ordinances of Queen Elizabeth, it cannot prevail against the will and the letters-patent. Besides which, there is no satisfactory proof that the deed containing those ordinances was ever completely executed, since not the copy remaining with the Dean and Canons, but only a copy found in the Chapter House, at Westminster, has the Great Seal attached to it; and it is plain that it was never executed by the Dean and Canons themselves. It cannot, therefore, be binding on them, and therefore cannot be relied on by them. But it is also submitted that, on the true construction of Elizabeth's ordinances themselves (assuming their execution and the proof of them to be sufficient), all the objects entitled beneficially to participate in the funds of the new dotation are entitled to participate proportionately in the increased rents. All the funds were impressed with the character of a charitable trust, and are, therefore, divisible among all the objects of the charity, in the proportions originally declared. The case of *The Attorney-General* v. *Bristol*[2] is the repository of the rules of law upon this subject. The rules that were * there laid down were these: * 380
First, that whenever the whole existing amounts of rent of any property in grant are distributed, and directed to be applied by the grantee, that is a conclusive indication of intention that all the future rents, however much increased, shall be applicable to the same purposes. Secondly, that where there is a general inten-

[1] 24 Beav. 679.

[2] 2 Jac. & W. 294, 3 Madd. 319.

tion manifested by an instrument to dedicate the whole of the property to charity, though that intention is not followed out by a distinct disposition of all the rents, yet the whole in all time to come shall be applicable according to the general intention so declared. Thirdly, that where a grant is made for certain charitable purposes which do not exhaust the whole of the income, and the surplus, *nomine* surplus, is given to the grantee, there an intention that the grantee shall enjoy the estate and the augmentations may be inferred; but, even there, the inference is open to the following exceptions, that where the amount of the surplus is in terms specified, the grantee must rank in the distribution only according to the ratio which that sum bore to the rest of the property, according to its value at the time of the grant.

[THE LORD CHANCELLOR.—And in future the increase must be distributed according to that ratio?]

Yes. If one gives an estate to A., worth 120*l.*, and directs him to pay 20*l.* to each of five persons, and 5*l.* to a sixth, and to take the residue to himself, then, if that estate afterwards augments to 5000*l.* a year, he does not take the whole augmentation beyond the 105*l.*, but only a proportionate part of it. *The Thetford School Case;*[1] *The Attorney-General* v. *Johnson;*[2] *The Attorney-General* v. *Caius College;*[3] *The Attorney-General* v. *The* * 381 * *Drapers' Company;*[4] the last of which is a very strong case, justifying this argument. They seemed to be shaken, but were not, by the cases of *Southmolton* v. *The Attorney-General,*[5] and *Beverley* v. *The Attorney-General.*[6] For in both these cases there were circumstances, especially contemporaneous and continuing usage (in the first of which the grantor himself took part), which, upon the application of the doctrine of intention, showed that the augmentations were to go not among the objects of the charity, but to the donees of the estate. There is nothing of that sort of thing here, but, on the contrary, there is the strongest reason to believe that from the first the Poor Knights and the clergy were intended to share equally in the bounty of the Crown.

[THE LORD CHANCELLOR.—I observe, in the judgment of the Master of the Rolls in this case, a statement that he conceived

[1] 8 Rep. 130 *b.*
[2] Ambl. 190. See also Attorney-General *v.* Sparks, Ambl. 201.
[3] 2 Keen, 150.
[4] 4 Beav. 67.
[5] 5 H. L. Cas. 1.
[6] 6 H. L. Cas. 310.

himself bound by the authority of the *Beverley Case*, but added, "The House of Lords alone can, if it thinks fit, decline to apply the principle of that case to the present." That observation is erroneous. If a principle of law is laid down here, it is a declaration of what the law is, and cannot be altered but by Act of Parliament. To distinguish another case from it does not destroy its authority.]

The amount of the residue here, like all the other amounts, is fixed and declared, and must, therefore, be subject to the same rules as they are. All must increase or decrease together.

Mr. Rolt (*Mr. Bernard* and *Mr. Cracknell* were with him) for the Poor Knights, contended.—First, that no beneficial interest in the lands of the new * dotation was given to the * 382 Dean and Chapter by the will of Henry VIII., or the letters-patent of Edward VI. Secondly, that under the latter instrument a trust was created for the benefit of the Poor Knights in the lands of the new dotation, reserving power to the Crown to appoint and specify the extent and the mode of enjoyment. Thirdly, that there had been no such appointment by the Crown, and that, therefore, a scheme must now be settled by the Court of Chancery, having regard to the rights of the Poor Knights under the indenture and patent of Edward VI. Fourthly, that if, contrary to this contention, it should be said there had been such appointment, it was to be made out by expressions in documents, printed in the cause, and not by any thing in the alleged book of Queen Elizabeth, which was not authoritative. Fifthly, that this alleged book was not admissible in evidence in the case, and certainly not as against the Poor Knights. Sixthly, that if any of these documents, or the book of Queen Elizabeth, could be established as an appointment made by Edward VI., then on their proper construction the Dean and Canons were not entitled to take the increase in the revenues, but that increase must be apportioned between all the objects of the bounty. The land had been granted by Edward III. expressly for the purpose of maintaining the Poor Knights and the Canons in the same manner. It never was the intention of that Sovereign that the knights, whom he spoke of and treated as decayed gentlemen who had done service in the wars, should have a miserable sum doled out to them, while the Dean and Canons were living in splendour on the funds he had granted. He meant that all should

fare alike. The Dean and Canons could not take the lands and avoid the obligation. In the time of Edward IV., it was true that they had been, by an Act of Parliament, exonerated from *383 maintaining the Poor Knights; *but complaints had been constantly made of that Act as obtained by fraud and misrepresentation, and it was therefore that Henry VIII. had ordered a re-endowment, and re-imposed on the Dean and Canons the obligation. The Sovereign had clearly the power to do this; and what took place in the time of Edward VI. showed the intention to carry into effect the will of Henry VIII. Any thing in derogation of that intention could not be permitted.

All the lands producing the 600*l.* a year, that is, all the lands given (for the others were merely in compensation for lands obtained from the Deans and Canons), were impressed with the charitable purpose; and though this might be said to be subject to the power reserved, if that power was not formally executed it would be inoperative, and a scheme must be framed independently of it to carry the charity into effect. The Court of Chancery has power to do that, and can in such a case as this do so without reference to the precise prayer of the bill. *The Attorney-General* v. *Jeanes*;[1] *The Attorney-General* v. *Whiteley*.[2] Assuming, however, that there was an appointment of the fund, its construction is not governed by the *Southmolton Case*,[3] or by the *Beverley Case*.[4] The language in the three cases is not the same. In those cases the fact that the fund was, in the first instance, given to the corporations for their benefit, might perhaps itself indicate an intention that the gift to the corporation should be treated as a gift to a charity, and the increase be taken by the corporation.

[THE LORD CHANCELLOR. — Can a municipal corporation be the subject of a charitable gift?]

*384 *Certainly. It was so in the case of *The Corporation of Gloucester* v. *Osborn*.[5] In the *Southmolton* and the *Beverley Cases* the question was on the intention of the testator, and on that alone. The intention here must have been to benefit the Poor Knights equally with the Dean and Canons. And it is a settled proposition of law, that where residue is given, accompanied with some evidence that the testator or grantor is dealing with a

[1] 1 Atk. 355.
[2] 11 Ves. 247.
[3] 5 H. L. Cas, 1.
[4] 6 H. L. Cas. 310.
[5] 1 H. L. Cas. 272.

fixed sum, that residue, though so named, must be treated as a fixed sum. In this will there were but two things, the gift to the Dean and Canons and the gift to the Poor Knights; both were apportioned, and both, therefore, increased together; and though the lands themselves appear to be given to the Dean and Canons, it was not as a bounty but as a trust.

As to usage, though it is admitted as a principle that a settled usage is to be adhered to, *The Attorney-General* v. *Whiteley*,[1] yet in *The Attorney-General* v. *Hartley*,[2] Lord Eldon himself, referring and adhering to his former decision, suggested that that principle was only to be applied with due consideration of the whole of the evidence. If that evidence explains what appears to have been the usage, so as to show that that usage has either arisen from peculiar circumstances, or has been wrongfully persevered in through the strength of one party and the weakness of another, the usage will not form a good ground of decision for a Court of equity. Now that certainly has been so in the present case; the Dean and Canons have exercised an influence never enjoyed by the Poor Knights, and have thereby secured to themselves benefits which, on the principle just referred to, can no longer be continued to them.

* *The Solicitor-General* (*Sir W. Atherton*) and *Mr. Wickens* for the Crown contended. — That, subject to the exception of the lands granted in compensation, the lands here granted vested in the Dean and Canons with a resulting trust for the Crown absolutely. If so, then the Court would not have direct authority to approve of a scheme, though the Crown would give due weight to the opinion of the Court in directing the administration of its own bounty. They adopted the arguments already urged, that the execution of the deeds relied on by the Dean and Canons was not properly established, and certainly they were not operating and governing instruments. The deed called the deed of Elizabeth was not properly established, and no mere usage could establish it as against the Crown. But if the secondary evidence as to the deed and ordinances of Elizabeth should be deemed to establish their legal existence, so far as the execution by the Crown was concerned, then the objection arose that the Dean and Canons * 385

[1] 11 Ves. 241.

[2] 2 Jac. & W. 353.

had never executed and accepted them, and, therefore, could not take advantage of them. Then there was evidence of a misrepresentation by the Dean and Canons as to the value of the lands they had received from the Crown; and that fact must affect the grant itself, for if the Crown was deceived the grant was void. Chitty's Prerogative,[1] *Grendit* v. *Baker*,[2] *Chambers* v. *Mason*,[3] *The Attorney-General* v. *Ewelme Hospital*.[4]

[THE LORD CHANCELLOR. — Can you find any case in which the Crown has taken advantage of a deceit without a *sci. fa.* ?]

Perhaps not directly; but here, where the party sets up the grant, the validity of what he relies on must be established, * 386 * and if it appears that the Crown has been deceived he cannot rely on the grant so obtained.

[LORD CRANWORTH. — You call this a resulting trust. If it was an express trust you would be barred by the Statute of Limitations. Are you not barred now ?]

No. And this being the case of a deed of the Crown the rule of construction is not favourable to the grantee.

Then again, the Dean and Canons by the instrument in the first year Edward VI. agree to hold the lands on such conditions as should be imposed in the indenture to be afterwards executed. No indenture has been executed by the Crown, and the power to execute one still exists. What the will of Henry VIII. specifically gave the Poor Knights and the Dean and Canons, that they are entitled to, but there is a resulting trust in the Crown for the increase.

Mr. R. Palmer and *Sir H. Cairns* (*Mr. Arthur Hobhouse* was with them) for the Dean and Canons. — It is not necessary to vindicate the Dean and Canons from imputations which can only affect their long-departed predecessors, and the permanent interests of the corporation are not affected by their acts. The question to be considered here is the combined effect of the two deeds, 7 October, 1547, and the ordinances of Elizabeth. The will and both the deeds show a strong intention that the Dean and Canons should take the estate, taking it subject to the payment of certain and ascertained charges. The will of Henry VIII. showed that he was most anxious about the condition of his own soul, and therefore most earnest about the prayers of the Dean and Canons being

[1] 397, 398.
[2] Yelv. 7.
[3] Yelv. 48.
[4] 17 Beav. 366.

secured for him. For this purpose they were made the donees of the lands, subject only to the condition of paying certain charges. No one could have been ignorant that the value of those lands was capable of increase, yet no declaration * was made * 387 in the smallest degree showing an intention that the increase was to be apportioned. The Dean and Canons held these lands by the tenure of divine services, that is, praying for the soul of the donor and distributing alms to poor men; Coke upon Littleton.[1] That is not a trust; *Whiston* v. *the Dean and Chapter of Rochester*,[2] and *Attorney-General* v. *Magdalen College, Oxford*.[3] Then again, there is nothing in the alleged covenants binding the Dean and Canons to exhaust the whole fund in alms, but only so much as the King's executors shall think fit; and the executors did not think fit to direct that the whole should be so employed. The lands were, therefore, in the hands of the Dean and Canons subject only to the will of the King as explained and expressed by the executors; and so far as that will had been explained and expressed by them, the respondents were only bound to make certain payments. There was no resulting trust.

As to Elizabeth's deed and the ordinances, the first question is whether that deed was ever executed at all, and the next, whether a correct copy of it is before the House. It certainly was not executed by the Dean and Canons, but that is unnecessary if it was accepted and acted on by them. Now, undoubtedly it was executed by the Queen, and adopted and acted on by them. And there is no good ground for doubting that a correct copy is to be found in Fryth's Register.

It may be admitted that if the Crown has been deceived in making a grant, a long user under that grant will not render it valid; *Alcock* v. *Cooke*;[4] but there has been no deception here; and if there had been, the grant of the Crown could only be avoided upon *scire facias*.

* If the whole land is dedicated to charity, and there is a * 388 surplus which the founder has not disposed of, that will fall to be applied by the Court to the purposes of charity; but if the whole land is parcelled out amongst certain objects, the Court has no discretion to vary the distribution of the fund, and the ultimate residue and the surplus are in fact disposed of. Here the lands

[1] Sec. 137, p. 96 *b*.
[2] 7 Hare, 532.
[3] 10 Beav. 402.
[4] 5 Bing. 340.

are disposed of to the Dean and Canons, and it is clear upon all the documents taken together that they took the lands with a certain specified burden. If they sustain that burden they are entitled to any accidental benefit. The intention of the founder is alone to be consulted. *Jack* v. *Burnett*[1] was a strong instance as to the intention of the founder, to be collected from the whole deed, governing the application of the surplus; and there, too, the donees taking the land with a burden were held entitled to the benefit of the surplus. As the loss would fall on them so they are entitled to the advantage of the gain: *The Thetford School Case;*[2] *The Attorney-General* v. *Bristol;*[3] *The Attorney-General* v. *Brasen Nose*;[4] and these cases show that where the words are doubtful, contemporaneous usage may give them a construction. And Lord Chancellor Cranworth, in *Southmolton* v. *The Attorney-General*,[5] explains the principle in an observation made with reference to *The Attorney-General* v. *The Mayor of Bristol;*[6] he says: "Though the testator there does not state the amount of the residue, he does state the amount of the whole property, and then the particular charges upon it, so that the amount of the residue is necessarily implied." The only difficulty is to discover * 389 the real intention in each * particular case, but that difficulty being overcome all the cases will be found capable of being reconciled.

The estates were given on condition (rather than on trust), and the conditions have been performed. The donees are therefore entitled to hold the estates; *The Attorney-General* v. *The Cordwainers' Company;*[7] a principle distinctly recognised by Lord Cottenham in *Jack* v. *Burnett*.[8] The payments to the Poor Knights could not increase with the increasing value of the land, unless all the other payments mentioned in the ordinances increased in like manner, and no one pretends that that was the intention of Elizabeth. Several cases have laid down the rule, that if the funds decreased the donees should lose, therefore if they increased the donees should gain; *The Thetford School Case*.[9] Lord Eldon criticised this reasoning, but yielded to it in *The Attorney-General*

[1] 12 Clark & F. 812.
[2] 8 Rep. 130 *b*.
[3] 2 Jacob & W. 294, 318.
[4] 2 Clark & F. 295, 326.
[5] 5 H. L. Cas. 1, 13.
[6] 2 Jacob & W. 318.
[7] 3 Mylne & K. 534.
[8] 12 Clark & F. 822–828.
[9] 8 Rep. 130 *b*.

v. *Bristol*,[1] *The Mercers' Company* v. *The Attorney-General*,[2] *The Attorney-General* v. *Caius College*.[3] In *The Attorney-General* v. *Johnson*,[4] though the augmentation was allowed to some of the charities, Lord Hardwicke acted on the intention alone, for he expressly said, "I do not intend that all the uses should be proportionably augmented."

Mr. Fleming appeared for the Ecclesiastical Commissioners, whose interests, so far as this appeal was concerned, were admitted to be identical with those of the Dean and Canons.

Sir. F. Kelly, in reply, insisted that the Beverley case must be restricted to circumstances exactly similar to * those which existed there, and that consequently it was not applicable here. * 390

THE LORD CHANCELLOR (LORD CAMPBELL).—My Lords, this appeal deserved, and I trust has received the most deliberate consideration. After being argued seven days at your Lordships' bar, we have taken several weeks to peruse all the documents and depositions laid before us, to examine all the authorities which have been cited on either side, and to weigh well the conflicting reasoning of the eminent advocates who have addressed us.

That no parties claiming an interest in the controversy, who have expressed a wish to be heard again before it is finally decided, may have any cause to complain, we have listened to the counsel of some whose interest turns out to be imaginary.

The real parties before us (and they indeed have a deep interest) are, on the one side, the Dean and Canons of Windsor, who have subsisted since the reign of Henry I.; and on the other, the Poor Knights of Windsor, a body created by Edward III., when he established the Order of the Garter.

[His Lordship described the parties interested in the suit.]

It is contended that, after making the payments specified in the original dotation, the surplus of the revenues, now increased from 800*l.* to 14,000*l.* a year, belongs absolutely to the Dean and Canons.

The Poor Knights contend that they are entitled to a ratable

[1] 2 Jacob & W. 294. [2] 2 Bligh N. S. 165. [3] 2 Keen, 150.
[4] Ambl. 190. See also Attorney-General *v.* Sparks, Ambl. 201.

proportion of this surplus, in the ratio which the sums specifically allotted to them bear to the estimated value of the lands at the time of the dotation.

This controversy has now been going on for two centuries * 391 * and a half, and, although never till now regularly brought into a Court of justice to be judicially determined, it has been referred to arbitrators of high name in our judicial history, such as Lord Chief Justice Popham, Sir Edward Coke, and Sir Dudley Ryder. But these inquiries were very unsatisfactory, for important documents were withheld from the arbitrators, and (strange to say) each party denied the existence or operation of deeds which may be considered as supporting the claim of the party so denying.

We have now before us every thing that can be of the slightest assistance in bringing us to a right conclusion.

I must confess that it would have given me great satisfaction if, consistently with the rules of law, I could have advised your Lordships to reverse the decree of the Master of the Rolls, pronounced for the Dean and Canons, and to decide in favour of the Poor Knights.

Had the advisers of the Crown, when the grants we have to construe were made, foreseen the increasing productiveness of land, and the depreciation of the currency, I make no doubt that provision would have been made for the Poor Knights, so as to enable them in all time to come to enjoy their modest comforts. That most learned and able Judge, the present Master of the Rolls, points out a decision of this House, which he says he thinks clearly governs the present case, adding,[1] "The decisions of the House of Lords are binding on me, and upon all Courts, except itself." I feel it my duty to say that I think this expression is incorrect. By the constitution of this United Kingdom, the House of Lords is the Court of Appeal in the last resort, and its decisions are authoritative and conclusive declarations of the existing state of * 392 the law, and are * binding upon itself when sitting judicially, as much as upon all inferior tribunals. The observations made by Members of the House, whether law members or lay members, beyond the *ratio decidendi* which is propounded and acted upon in giving judgment, although they may be entitled to

[1] 24 Beav. 715.

respect, are only to be followed in as far as they may be considered agreeable to sound reason and to prior authorities. But the doctrine on which the judgment of the House is founded, must be universally taken for law, and can only be altered by Act of Parliament. So it is, even when the House gives judgment in conformity to its rule of procedure, that where there is an equality of votes, *semper presumitur pro negante*. In the celebrated case of *Regina* v. *Millis*,[1] which was an appeal from a judgment, holding that by the common law of England a valid marriage could not be contracted without the presence of a priest canonically ordained, the question having been put, that the judgment be reversed, there was an equality of the votes of the Peers who were present and took part in the division. Thereupon the House affirmed the judgment, deciding that, by the common law of England, a valid marriage could not be contracted without the presence of a priest canonically ordained. I by no means concurred in that decision, thinking that the common law of England accorded with the canon law upon this subject, which prevailed over the whole of the Western Church till the Council of Trent, and that a valid marriage might be contracted by the solemn assent of the contracting parties, as Lord Stowell had often laid down, and for fifty years had been considered clear law in Westminster Hall. But subsequently, when presiding as Chief Justice of the Court of Queen's Bench, I several times, with the approbation of * my brother Judges, ruled that the question as * 393 to the validity of such marriages was settled by the decision of the House of Lords in *Regina* v. *Millis*. And if this question were again to be mooted in this House upon an appeal, I conceive that this House would be bound to decide that such a marriage was always null and void, although every Peer present should be of opinion that *Regina* v. *Millis* was improperly decided, and that in England, till Lord Hardwicke's Act, the presence of a priest was as little necessary for making a binding marriage contract as a binding contract of hiring and service.

The law respecting the application of the increased profits of charity lands is well settled by decisions of this House, and by decisions of inferior Courts which this House has recognised. I have examined and considered all the authorities referred to, from

[1] 10 Clark & F. 534.

the *Thetford Case* [1] to the *Beverley Case*.[2] I shall not have occasion to analyse or to comment upon any of these decisions, for they do not lay down any rule more closely applicable to the present case than the rule (which is not disputed), that "the intention of the donor is to be regarded, and the Court is to consider whether the lands were given in trust exclusively for charitable purposes or beneficially, on condition that specific sums are paid for charitable purposes." There was hardly any dispute at the bar with respect to the rules of law by which we ought to be guided, and the case depends upon the application of these rules to evidence before us. In the words of Lord Wensleydale, in the *Beverley Case*, "This question resolves itself purely into a question of construction." We must look at the instruments to be construed, and see whether, taking them altogether, we * 394 discover an intention on the part of the donors * that the rents should be divided in certain proportions, and given to the different objects of the bounty of the donors in those proportions, or whether the intention manifested is, that specified sums should be permanently paid to particular objects of the bounty of the donors, and that they should be entitled to nothing more than the payment of these specified sums, without abatement and without augmentation.

It would appear that, by the foundation of Edward III., when he instituted the Order of the Garter and created the Poor Knights, a certain obligation had been cast upon the Dean and Canons to provide for the Poor Knights, the King having promised the Dean and Canons lands to enable them to do so. But by an Act of Parliament passed in the 22 Edw. 4, reciting, that "the possessions given to the said Dean and Canons, or to their predecessors, suffice not to sustain all other charges, and also to bear the charges of the Poor Knights," it was enacted, "that the same Dean and Canons, and their successors for evermore, be utterly quit and discharged from all manner of exhibition or charge of or for any of the same knights."

And down to the end of the reign of Henry VIII. the Poor Knights appear to have been fed only with promises, and no permanent provision was made for them. In the 3 Hen. 8, the Dean and Canons having, at his request, granted to a Poor Knight,

[1] 8 Rep. 130 *b*.

[2] 6 H. L. Cas. 310.

named Peter Narbonne, an annuity of twenty marks for his life, the King wrote to them a letter of thanks, in which he acknowledges that they were not bound to find any thing for the Poor Knights since the 22d Edw. 4; thanks them for their bounty to Peter Narbonne; promises them favour in their suits hereafter as a recompense, and assures them "that they shall not be burthened with the maintenance of any other Poor Knights till such time as he should have provided lands for their * exhibition * 395 which not only should be sufficient to discharge the Dean and Canons of such knights, but also of the said annuity."

This promise was not fulfilled; and when Henry's end approached the breach of it lay heavily upon his conscience.

There is now no dispute as to the proof of Henry's will, or of the instruments relied upon, to which Edward VI. was a party; viz., instructions dated 2d August, 1547, in consequence of an order of the Privy Council, signed by Sir Edward North, Chancellor of the Court of Augmentations, to prepare a conveyance in pursuance of the will of Henry VIII., of certain hereditaments belonging to the Crown; an indenture, dated 4th August, 1547, between Edward VI. of the first part, the Protector and the executors of the deceased Sovereign of the second part, and the Dean and Canons of the third part; and letters-patent under the Great Seal, dated 7th October, 1547, granting these hereditaments to the Dean and Canons in free and perpetual alms on certain conditions, and for certain purposes therein mentioned.

But with respect to what is called Elizabeth's "Deed of Distribution," alleged to have been executed under the Great Seal, there was a contention, first, that no such deed had ever been executed; secondly, that there was no sufficient evidence of its contents; and, thirdly, that at all events it must be considered void on the ground that the Queen had been deceived in her grant.

I must say, however, that I agree with the Master of the Rolls in thinking that there is overwhelming evidence of this deed having been executed under the Great Seal, and that there is abundant evidence of its contents.

The supposed deceit by which the "Deed of Distribution" * was to be nullified, was first brought forward at the * 396 hearing of this appeal, and led to long discussions whether it could be urged upon the pleadings as they now stand, and whether it could be urged at all without a *scire facias* to repeal the deed.

But on these points I consider it unnecessary to give any opinion, as I find no sufficient evidence of any intention to deceive, or of the Crown having been deceived. Those who then advised the Crown had ample means of knowing, and must have known, the real value of the lands; and it would be too much now to start a charge of fraud, because there is some obscurity in accounts, when those who might have explained them have been nearly three centuries in their graves.

In seeking to construe the instruments on which the case mainly turns I begin with the will of Henry VIII. By itself it passed no legal or equitable interest. Although till statute 1 Anne, c. 7, the sovereigns of England, by conveyance of record, to operate *inter vivos*, might grant and alienate any part of the demesne lands of the Crown, at the common law they had no testamentary power. The Statute of Wills, 32 Hen. 8, c. 1, applies only to the King's subjects. By 28 Hen. 8, c. 7, and 35 Hen. 8, c. 1, that Sovereign was empowered by his will to settle the succession to the Crown, and to give titles and hereditaments, but only to "persons of his blood." No testamentary power was given to him by 38 Hen. 8, c. 8, which made his proclamation, attended with certain forms, equal to an Act of Parliament. Therefore, his will, while it might have regulated the succession to the Crown, in as far as it concerned the lands to be granted to the Dean and Canons of Windsor, had no legal validity or operation. But while this part of the will of Henry VIII. gave no right and im-
* 397 posed no perfect obligation, it deserves * the most serious consideration, when we come to examine the intention of those who acted with the view of carrying it into effect.

[His Lordship here stated the will at full length.]

It must be borne in mind that in 1546 the Dean and Canons had, by deed, conveyed to the King the manor of Ivor and other hereditaments of the yearly value of 160*l.* 2*s.* 4*d.*, in exchange for other lands which the King was to convey to them, but which he never had conveyed.

Now it seems to me that the intention of Henry VIII. is shown to have been that these lands should be conveyed to the Dean and Canons beneficially under the charge of paying to every one of the Poor Knights twelve pence every day, and providing for them once a year a long gown of white cloth and a mantle of red cloth, and to the head and governor of the thirteen knights a farther gratuity

over and besides the twelve pence by the day. Hitherto there is no symptom of any contemplation of apportioning the rents of the lands to be conveyed between the Poor Knights and the Dean and Canons.

The King having died on the 28th January, 1546–7, his son Edward, and the Privy Council, and the executors of the deceased Sovereign, consulted with the Judges and law officers as to carrying into effect the directions of the will in favour of the Dean and Canons and the Poor Knights, and Sir Edward North, the Chancellor of the Court of Augmentations, signed the instructions for the preparation of a conveyance in pursuance of the will. This document specified various rectories and hereditaments which had belonged to the lately dissolved monasteries, and were then vested in the Crown. These consisted of thirty items, each valued in pounds, shillings, and pence, amounting in the whole to the clear yearly sum of * 812*l.* 12*s.* 9*d.* From this amount it * 398 stated there were first to be deducted 160*l.* 2*s.* 4*d.* for Ivor, &c., and then for the King's gift in fulfilment of the will of Henry VIII., 600*l.*, and the remaining 52*l.* 10*s.* 5*d.* were to be reserved as a rent to the Crown. To this was added a declaration that the Dean and Canons were to be bound by the rules hereafter to be made by the Lord Protector and his co-executors.

Next comes the indenture bearing date 4th August, 1547, between Edward VI. of the first part, the Lord Protector Somerset and the executors of the deceased King of the second part, and the Dean and Canons of the third part; after reciting the will of Henry VIII., and that the Dean and Canons were still unrecompensed for Ivor, &c., amounting to 160*l.* 2*s.* 4*d.*, it goes on to declare that the then King desired to carry the will of his father into effect, and explained how that object was to be effected, and gave directions accordingly.

Next comes this important covenant that the Dean and Canons shall bestow and employ the rents, revenues, &c., in such manner as the Lord Protector and his co-executors shall, by a tripartite deed to be afterwards made, direct and appoint, and shall fulfil all rules, &c., therein specified.

On the 7th October, 1547, letters-patent actually passed the Great Seal, whereby the King, in performance of his father's will, granted to the Dean and Canons the premises mentioned in the deed.

The indenture tripartite thus contemplated was not executed, and nothing more was done to create or give effect to any legal or equitable interest in the lands granted till the beginning of the reign of Elizabeth.

The Dean and Canons denying that any operation was to be given to an alleged deed of Elizabeth, on which the *399 *Poor Knights mainly relied, insisted long that under these instruments to which Edward VI. was a party, they, the Dean and Canons, were entitled beneficially to all the profits of the lands supposed to constitute the new dotation. But I agree with the Master of the Rolls in thinking that this position is untenable. The deed of 4th August, 1547, reserved a power to the King, the Lord Protector, and the executors of Henry VIII., by a deed, to which the Dean and Canons were to be parties, to prescribe, limit, and appoint the intents and purposes to which the rents, revenues, and profits of so much of the hereditaments granted as should amount to the yearly value of 600*l.*, the Dean and Canons undertaking to observe and fulfil and keep all such acts, ordinances, and rules as in the said indenture thereafter to be made should be specified and contained.

The reserved power not having been executed by Edward VI., the Protector, and the executors of Henry VIII., I think there was a resulting trust in favour of the Crown, and Queen Elizabeth might have resumed the hereditaments of the new dotation, in as far as they were given without valuable consideration, or disposed of them for charitable purposes as she pleased. The Dean and Canons were to hold in frankalmoigne; but this tenure, although consistent with a beneficial interest in the grantees, is likewise consistent with a charitable trust, beyond making orisons, prayers, and other divine services for the souls of the departed donors, and for the prosperity and good life and good health of their heirs who are alive.

The Dean and Canons having entered into possession of the hereditaments granted by Edward VI., and received the rents and profits, accounted to the Crown for so much as was considered to be appropriated to the new dotation, and appear to have *400 applied a considerable part of them in rebuilding *the houses at Windsor which had been occupied by the Poor Knights, and which (with the Order of Poor Knights) had fallen into great decay.

Elizabeth, at the commencement of her reign, filled up the number

of the Poor Knights to thirteen, and resolved to make permanent provision for them according to the will of her father, and the partly executed plan of her brother.

Accordingly, on the 30th day of August, in the first year of her reign, she executed an indenture under the Great Seal, purporting to be between Her Majesty of the one part, and the Dean and Canons of Windsor of the other part. This instrument recited the purpose of the grant, and the means taken to secure performance of that purpose (see ante, p. 375). By the book annexed to this indenture, the Queen, after reciting the erection by her royal predecessors of the College of Priests within the Castle of Windsor, where the noble Order of the Garter was founded, and that in this college certain ministers were ordained to serve God and to pray for the good estate of the Sovereign and companions of the said order, repeats the objects in view and the means taken to secure them, and proceeds to make ordinances for that purpose, which ordinances, by the covenant in the previous deed, the Dean and Canons were bound to observe.

The question has been much agitated, whether this "deed of distribution" was executed by the Dean and Canons. I think there is strong evidence to show that it was executed by them. But this fact seems to me to be wholly immaterial to the operation of the deed, for the deed professes to take nothing from the Dean and Canons; and it is a mere exercise of the prerogative of the Crown. It cannot be considered the execution of the power of appointment * reserved by the deed of 4th August, * 401 1547, but it is authorised by the resulting trust in favour of the Crown, in default of appointment under that power.

After the execution of this deed by the Queen, under the Great Seal, no interest in any part of the hereditaments of the new dotation remained in the Crown, and no part of the profits was impressed with any general unspecified charitable trust. So that the Solicitor-General fails in showing that the Crown has any private right of property in them; and the Attorney-General fails in showing that a new scheme of a charitable character for appropriating any part of the rents and profits of the new dotation can be made by the Court, or under the sign manual of the reigning sovereign.

The only question seems to me to be, whether the Dean and Canons are bound to divide the increased rents and profits of the hereditaments of the new dotation among the thirteen Poor

Knights, the two bell-ringers, the porter, the clock-keeper, and all those enumerated in Elizabeth's book, under the head of "continual charges," in the proportion which the allowance allotted to each in the book bears to the aggregate estimated yearly value of these hereditaments.

Looking to the instruments to be construed, my opinion is, that the intention was, that these specified payments were meant to be fixed and "continual," and that the Dean and Canons making the pecuniary payments, and furnishing the specified allowances to the objects of the charity for whom they were so far trustees, were entitled to apply any increase in the rents and profits for the benefit of the corporation. In the reign of Edward VI. and the beginning of the reign of Elizabeth, I presume that rents were as likely to fall as to rise. During the American war, and at other * 402 periods even of the eighteenth century, * there is said to have been a general and serious fall of rents. If, after the year 1558, the rents applicable to the appointed charges had not amounted to the estimated sum of 430*l.*, was there to be an abatement in the allowance provided for the thirteen Poor Knights, the two bell-ringers, &c.; and would the Dean and Canons have been entitled to make a calculation, according to the Rule of Three, of the ratable deductions in respect of what they ought to receive as the price of Ivor, and the hereditaments which they had conveyed to Henry VIII., and which he had never paid for? The agreement finally made between the Dean and Canons and the Crown seems to me to have been, that they should take the hereditaments conveyed by Edward VI. for better, for worse, in satisfaction of any claim they might have upon the Crown, and that they would forever make all the payments and furnish the supplies specified in the book of Elizabeth. She expressly declares (having the full power to do so) that "the residue was to remain for the relief of said Deans and Canons and their successors." This clause contains a statement of the amount of the residue ("being 231*l.* 6*s.* 8*d.*"), but this is only expressing what was the necessary result of the simplest effort of mental arithmetic; and in the absence of fraud (of which there is no proof), this is a true statement of the residue coming to the Dean and Canons, while the rents and profits should remain unchanged.

In such cases, usage is certainly much to be regarded; and here the usage seems to me to be strongly in favour of the Dean

and Canons. Although the rents and profits of the new dotation had greatly increased early in the seventeenth century, the Poor Knights have actually never received more than the payments and allowances provided for them by the book of Elizabeth. They have certainly complained much, but this may be accounted for from the * seeming hardship of their case, and the * 403 sympathy they were sure to meet with. Although gentlemen by birth and breeding, and although many of them had gained distinction in the military service of the Crown, the provision which it was thought would be sufficient to enable them to make a respectable appearance before their Sovereign, and to associate with the Knights Companions of the Garter, had left them almost as destitute as parish paupers. The circumstance of the claim being often and loudly made, rather adds to the effect of the actual usage, showing the enjoyment of the Dean and Canons to have been adverse. I attach no weight to the opinions of the eminent lawyers who have extra-judicially examined the subject, as important documents, on which the case mainly turns, were not before them, and neither party there knew the true merits on which they ought to have relied. But a usage of centuries, which may have a legal origin, is not to be upset by inexplicable items in stewards' accounts. I am not aware of any evidence in this case inconsistent with the supposition that the Dean and Canons, since the "deed of distribution," have regularly applied for their own benefit any surplus which arose of the rents of the new dotation. The accounting subsequent to the deed of distribution, — suggested to have been to the Lord Treasurer representing the Crown, — turns out to have been to the officer of the Knights of the Garter, whose duty it was to see that the payments and allowances, required by the book of Elizabeth, to the Poor Knights and others, were duly made. Construction and usage therefore seem to concur in favour of the Dean and Canons.

I have not yet noticed the Ecclesiastical Commissioners, who have appeared as a party at your Lordships' bar; but they must have shared the fate of the Dean and Canons, * as * 404 they can only be supposed to take the Windsor canonries transferred to them, with the rights and liabilities which lawfully appertained to those canonries before the transfer. According to my opinion, the value of those canonries will not be lessened by the claim of the Poor Knights.

In conclusion, I beg permission to express my regret that the Poor Knights must now finally abandon the claim which for two centuries and a half they have strenuously urged. Successive English sovereigns, from Edward III. downward, have expressed a high regard for them; and Henry VIII., Edward VI., and Elizabeth, use general expressions, as if the new dotation was to be principally for the benefit of the Poor Knights. But where the instruments are framed to give an interest which may be judicially enforced, language is used which, in its operation, confines the Poor Knights to the payments and allowances specifically assigned to them. Had prices and manners remained stationary, these payments and allowances would have been modestly sufficient. In the present state of the world they are a mockery; but under such circumstances we can give no relief.

Upon the whole, my Lords, I must advise you to dismiss the appeal; this, however, should be without costs, for the information was filed by the Attorney-General, on an address to the Crown, made by a branch of the Legislature, and the Dean and Canons having formerly rested their case on a false foundation, it was fit that the controversy should be finally decided by this House on a full view of all the evidence and all the arguments by which our decision ought to be influenced.

* 405 * Lord Cranworth, after stating the nature of the suit, said. — The question turns on the construction of the original instruments of foundation, and involves the consideration of doctrines which have frequently of late come under discussion, not only in the Court of Chancery, but also in this House; namely, the question as to who is entitled to the surplus revenues of land given for purposes of charity, where there has been an increase in the value since the foundation; whether the charitable objects are entitled to participate ratably in any increased revenue, or whether the increase belongs to the persons or corporate body in whom the lands are vested.

The rule is now well established (whether resting on a solid foundation or not we need not inquire), that where an annual sum, amounting to the whole of the rents of an estate, is by the will or deed of foundation apportioned among different charities, and the rents afterwards increase, the charities shall share among them the improved as well as the original rents.

So also, if by the original instrument of foundation the founder has expressly or impliedly declared his intention to devote the lands to charity, though in his particular appropriation he may have failed to exhaust the whole of the rents, yet the general intention to devote the whole to charity prevails, and the property, to whatever value the lands may eventually rise, is held to be devoted to charitable uses.

On the other hand, where the founder of a charity conveys lands to persons for the purpose of securing, through their agency, certain pecuniary benefits of specified amounts to various objects of charity, and the sums so devoted to charity do not exhaust the whole revenue, there is no rule of law which says that the surplus rents * may not have been intended as bounty to * 406 the persons in whom the estate has been vested. Where those persons are themselves a charitable corporation, or trustees of a charity, it may be that the intention of the founder, to be collected from the instrument of foundation, was, that they should share ratably with the other objects of his bounty, and so that they should all proportionately benefit by any rise in the value of the property. The same inference may arise even when the persons to whom the lands have been conveyed or devised are not an eleemosynary corporation, or in anywise connected with charity; but whether this is the intention to be collected from the instrument, or whether the surplus was intended as bounty to those in whom the property is vested, must obviously be a mere question of intention, to be solved in each particular case by attending to the whole of the contents of the instrument of foundation.

It was on this principle that your Lordships acted in the two recent cases of *Southmolton* v. *The Attorney-General*,[1] and *Beverley* v. *The Attorney-General*,[2] which have been so much commented upon in the argument of this case; the only specialty in those cases (if specialty it can be called) being that the amount of the surplus given to the donees of the lands was (so at least it was contended) specified by the donor in each instrument of foundation. Your Lordships held, that this circumstance did not conclusively indicate an intention that the persons to whom that surplus was given should only share in any increased rent ratably with the other objects of the donor's bounty. It could only be con-

[1] 5 H. L. Cas. 1.

[2] 6 H. L. Cas. 310.

sidered as one circumstance, amongst others, more or less tending to show what was the intention of the author of the charity.

* 407 * Taking, then, these principles as our guide, I do not feel much difficulty as to the conclusion at which I think the House ought to arrive in the present appeal.

In the first place, I think it clear, that we cannot look to any thing prior to the will of Henry VIII. The earlier documents to which we have been referred, though interesting as matters of antiquarian curiosity, and as showing the remote origin of the establishment of the Poor Knights, do not appear to me to help us in the conclusion to which we ought to arrive.

Looking, then, to the will of Henry VIII. as our starting point, let us consider what would be its true construction, treating it as the will of a person capable of disposing of his property by will; so regarding it, I cannot entertain any serious doubt but that the Dean and Canons were intended to take for their own benefit the whole of the lands directed to be made sure to them, subject only to the charitable uses created for the benefit of the Poor Knights and the other objects of the King's bounty. The language of the will is, that the Dean and Canons are to have the lands upon the conditions thereafter ensuing, and these conditions are then stated. [His Lordship read them; see ante, 372.]

The effect of them is to impose duties on the Dean and Canons of an onerous character, to enable them to discharge which, it is impossible not to suppose that adequate benefits were intended to be conferred on them. It is said that this would be the case, even though it should be held that they were intended to take only a proportionate share of the income. But there is nothing to indicate any such intention. The only gift to them is that which is contained in the direction that they should have lands to the amount of 600*l.* per annum made sure to them on certain conditions.

* 408 * I do not think it material to inquire whether, according to the true construction of the will, the payment of the charitable gifts was to be regarded strictly as a condition, the non-payment of which would entail on the Dean and Canons a forfeiture of their estate, or whether these gifts were, in fact, mere charges on the lands to be made sure to them. Whichever construction is adopted, the surplus rents would belong to the Dean and Canons, unless it can be discovered from the context that, to the extent of the rents unappropriated, the Dean and Canons were

to be considered as being merely farther objects of charitable bounty intended to share ratably with the others. But independently of the fact that no such intention is expressed, there are special grounds in this case for coming to the conclusion that this could not have been intended. In the first place, several of the duties imposed on the Dean and Canons were duties incapable of being measured by any pecuniary standard; it is impossible to say what would be the sums necessary for finding two priests to say masses, for keeping four solemn obits, for supplying gowns and mantles for the Poor Knights, and for causing a sermon to be preached every Sunday at Windsor. The will evidently left it to the Dean and Canons to discharge their obligations as cheaply as they could, provided only that they were discharged properly. I cannot suggest any mode in which the amount of the surplus, in respect of which the Dean and Canons would have to share in any increased revenues, could possibly be ascertained. It must depend on the sum at which they might be able from time to time to cause the duties imposed on them to be properly discharged. But farther, if the lands to be made over to the Dean and Canons should at any time have failed to realise 600*l.* per annum, there cannot be a doubt that the will did not authorise them to make any reduction in the * payments imposed on them; and this * 409 alone satisfies me that the will did not intend them to share ratably with the other objects of the royal bounty.

The lands are substantially directed to be given to them. The charges are of uncertain amount, and were obviously to be paid and discharged in full, even though the rents should have diminished in amount.

If, therefore, the decision of this case were to depend solely on the will of Henry VIII., it seems to me clear that the right of the Dean and Canons to the surplus could not be disputed.

But in deciding this case, other matters besides the will of Henry VIII. must be regarded; I will therefore briefly consider what was done after the death of Henry VIII. bearing on this question.

The will of the King contained a direction to his executors to complete all exchanges, and to make perfect all grants or gifts which might be imperfect at his death; and it is clear on the evidence, and indeed is not disputed, that under this clause, if carried into effect, the Dean and Canons were entitled to have lands conveyed to them worth 160*l.* 2*s.* 4*d.* annually in exchange for

two estates, Ivor and Damarey Court, parted with by them to the King.

It appears that immediately after the King's death, the Lord Protector and the other executors consulted the highest legal authorities as to the course they ought to take with reference to the contents of the will, and it was the unanimous opinion of the persons so consulted that the executors ought to select lands and hereditaments of an amount sufficient to answer the several purposes of the will. This was done. [His Lordship referred to the deeds, ante, p. 374.]

The evidence in the cause shows that, in pursuance of the opinion then given, the executors applied to the Court of * 410 * Augmentations, and, under the advice of Sir Edward North, the Chancellor of that Court, certain specified lands and hereditaments were set apart as proper to be conveyed to the Dean and Canons, of the annual value altogether of 812*l.* 12*s.* 9*d.*; and on the 4th of August, 1547, an indenture was executed in conformity with the legal opinion to which I have referred. [His Lordship stated the indenture.]

Letters-patent afterwards duly passed the Great Seal, dated the 7th of October, 1547, whereby all the lands were duly conveyed to the Dean and Canons, to the only proper use and behoof of them, and their successors, to hold of the King, his heirs and successors for ever, in free, pure, and perpetual alms.

How were the rights of the Dean and Canons affected by what had thus passed after the death of Henry VIII.? In the first place, the lands which they were to receive in satisfaction of their claim under the will were ascertained, and conveyed to them; and, secondly, whereas, by his will, Henry VIII. had required that they should covenant to perform the obligations thereby imposed on them, as the conditions on which the lands, to the value of 600*l.*, were to be made sure to them: instead of that, they covenanted with the executors that they would employ the rents of so much of the lands granted to them as should be of the yearly value of 600*l.*, or of so much thereof as the executors should think fit, in such manner as the King and the executors should direct by an indenture to be executed by them and the Dean and Canons. The effect of this was to leave to the King, and to the executors of Henry VIII., the settling of what the charitable objects should be, instead of taking them merely from the will. Why this change

was made does not distinctly appear; but probably all parties concerned felt that some more specific declaration than that contained in the will was desirable, in order to * prevent disputes; and, farther, that some other charitable or religious * 411 objects ought to be substituted for the finding of priests to say masses, which would not have been tolerated in the then temper of the country. The Dean and Canons not only left it to the King and the executors thus to declare the trusts anew, but also to fix the amount, agreeing, in terms at least, to employ the rents of the whole of the lands to the extent of 600*l.* per annum, or of so much thereof as to the executors should seem meet, upon the charitable objects to be agreed upon by the King and the executors. Probably it was understood or believed by the Dean and Canons, that though they thus put their interests into the hands of the King and his father's executors, no material change was contemplated as to the extent of the benefits intended for themselves.

The next question is, how were the Dean and Canons dealt with between the dates of these instruments executed in the first year of Edward VI. and the accession of Elizabeth?

This we must collect from the accounts in evidence relating to that period. We have only one account rendered to the Dean and Canons, namely, that of Arthur Cole, their steward, containing an account of his receipts and payments, from the Feast of St. Matthew, in the fifth and sixth years of Edward VI., to the same Feast in the following year, i. e. from the 21st of September, 1551, to the 21st of September, 1552.

The evidence in the cause shows that soon, probably immediately, after the grant to the Dean and Canons, a specific portion of the hereditaments conveyed to them had been set apart as an equivalent for the estates of Ivor and Damarey Court, and for the rent of 52*l.* 10*s.* 5*d.* reserved to the Crown. The hereditaments conveyed to them by the letters-patent of Edward VI. consisted of thirty distinct estates in different parts of England, * chiefly, * 412 if not entirely, parcel of the possessions of suppressed ecclesiastical bodies, to every one of which a specific annual value had been affixed by the Court of Augmentations, making in all, as I have before mentioned, the annual value of 812*l.* 12*s.* 9*d.* Nine of these thirty several estates, the annual value of which was 214*l.* 14*s.* 10*d.*, were set apart, — by what authority does not distinctly appear, but certainly with the approbation of the Crown, — for the purpose of

clearly established, that on the 30th of August, 1559, she executed an indenture, and made rules for the regulation of the * 415 charity created by * the will of her father. There was considerable discussion at the bar as to how far it is established that these documents ever were executed; no indenture under seal now exists; but I think it is established beyond all reasonable doubt that such an instrument was executed by Elizabeth, and, together with a Book of Rules for regulating the charity, was put into the hands of the Dean and Chapter. I do not think that the evidence shows it to have been ever executed by them; but it is not necessary to come to any decided opinion on this point, for even if they never executed it, yet though often complaining of it as operating harshly on them, and as not giving them what, under the will of Henry VIII., they considered themselves entitled to, they appear to have acted upon it as a valid instrument, and so to have accepted it, though unwillingly.

I have said that I think it is established beyond reasonable doubt that such an indenture was executed by Elizabeth; I will state the grounds on which I have come to this conclusion. Among the old records and documents in the Chapter House at Westminster is a box, containing the statutes of the Order of the Garter, and a book in which is bound up what purports to be an indenture between Elizabeth and the Dean and Canons, dated the 30th of August, 1559, together with a book setting forth the rules to be observed with reference to the Poor Knights and certain other charitable objects. The indenture recites that divers lands and hereditaments mentioned in the schedule annexed, and described as being of the clear yearly value of 600*l.* and above, had been assured to the Dean and Canons to the intent that the revenues thereof should be employed for the maintenance of the Poor Knights and otherwise, as is mentioned in the annexed book. And the Dean and Canons then covenant that they will employ the revenues * 416 according to that book. The schedule contains a list of * all the estates conveyed to the Dean and Canons by Edward VI., as well those in recompense for the lands exchanged as those to satisfy the 600*l.* per annum, the yearly value of the whole being stated, not according to the former valuation, at 812*l.* 12*s.* 9*d.*, but at only 661*l.* 6*s.* 8*d.* To the document thus described as an indenture, two strings are attached, which may have been strings to which the Great Seal was intended to be attached, but to which it

never was attached, or it may be the remains of strings to which the Great Seal had been attached, and from which it was afterwards cut off. The evidence is strong to show either that the Great Seal had once been attached to it, or if not, then that it had been attached to some other indenture, of which this was only a counterpart.

In the first place, as no indenture was ever executed by Edward VI., as stipulated by the deed of the 4th August, 1547, and none was executed by Mary, the great probability is, that when the houses for the Poor Knights were built, Elizabeth would desire to complete what had been left incomplete, and to make the rules which should thenceforth be binding on the Dean and Canons.

In conformity to this probability, we find, among the documents in the State Paper Office, a paper, apparently the draft of a letter to the Dean and Canons from the Queen, informing them that the thirteen Poor Knights had been appointed, and directing that the payments should be forthwith made to them, and promising to send to the Dean and Canons statutes as soon as conveniently might be; the date on this paper is 29th May, 1559. There is another similar paper on the 15th July following, in which the Queen says, she has sent therewith statutes and limitations of the expenses signed with her own hand.

* Upon occasion of one of the canons being appointed to * 417
the Bishopric of Winchester in 1595, he left an inventory of the documents then in his hands, and amongst them is one intituled "The Queen's Book, with the Great Seal, for the Poor Knights."

In Fryth's Register the indenture of Elizabeth, together with the Book of Rules, is set out at full length. One of the rules in the book found in the Chapter House is, that an account shall be rendered yearly to the Queen's lieutenant at St. George's feast at Windsor, to show that the payments directed by the book have been duly made. And among the documents in possession of the Dean and Canons is an account purporting to be rendered to the Earl of Northumberland, the lieutenant of the feast for the year ending at Lady-day, 1566, of all lands and their possessions contained and specified in a book indented, made between Elizabeth and the Dean and Canons, and dated 30th August, 1559. I am aware that this account never (so far as appears) was audited, but the mere fact that it was so prepared affords evidence almost

irresistible that such a book indented then existed, the date, 30th August, 1559, conforming, it will be observed, exactly with the date of the document in the Chapter House.

At the beginning of the reign of James I., the clerks of St. George's Chapel, considering that they had not all to which they were entitled under the statutes of Elizabeth, petitioned the then Lord Chancellor for redress. The matter was referred to Lord Chief Justice Popham and Sir Edward Coke, who reported against their claim; and from the language of their report it seems fair to presume that the Queen had sealed the indenture and book, but that the Dean and Canons had refused to do so. The clerks, * 418 not satisfied with this decision, presented a second * petition to Lord Ellesmere, in which they made express reference in support of their demand to a book of parchment indented under the sign manual of Elizabeth and the Great Seal of England, witnessed by her then secretary, Cecil.

A petition, with a similar object, was presented by the Poor Knights in the reign of George II.; and the subject was investigated by Sir Dudley Ryder, the then Attorney-General, who, by his report, dated 30th of March, 1738, states, that attested copies of the letters-patent of Elizabeth, and of the book annexed, dated 30th August, 1559, had been produced before him; and in a supplemental petition by the Poor Knights pending the investigation on their original petition it is expressly stated that, after several hearings before the Attorney-General, the indenture had been happily found and produced, corresponding exactly with that which is registered in Fryth's Register.

In the face of this evidence, it seems to me impossible to doubt that the document found in the Chapter House is either an original indenture executed by Elizabeth, the seal having been cut off, or that it is a true copy of such an indenture, the original having been lost or destroyed. Assuming it thus to have been executed by the Queen, and to be the document now regulating the application of the funds, the right of the Dean and Canons to the increased revenues can hardly be disputed. The obvious meaning of the provisions contained in the book was, after the paying the sums charged on the whole of the property, that the surplus should be retained by the Dean and Canons. Indeed, this is expressly stated in a memorandum at the foot of page twenty of the book; and the arguments which I have already adverted to, as showing

that * under the will of Henry VIII. the surplus was in- * 419
tended to belong beneficially to the Dean and Canons,
apply also to their rights under the book of Elizabeth. But then it was argued that this appropriation of the funds must be considered to have been obtained by fraud; that the Crown was imposed upon in the grant; and so that the instrument and all connected with it was void. And this was said to follow from the circumstance that the value of the lands had been misrepresented; that though really of the annual value of 812*l.* 12*s.* 9*d.*, they had been represented to the Crown, or its officers, to be only of the value of 661*l.* 6*s.* 8*d.* It is unnecessary to say that it lies on those who allege such a fraud to prove it; and after a lapse of three centuries your Lordships would expect very clear proof of its existence before you would feel justified in acting on the assumption that such deception was in fact practised, even if the pleadings would warrant such a course. Now there is not, so far as I can discover, any such proof; I do not pretend to explain why the value adopted in the book of Elizabeth differed from that under which the property had been conveyed to the Dean and Canons; but there is nothing to satisfy my mind that it must have been for a fraudulent purpose.

The first observation is this: the Dean and Canons must have known that any attempt to mislead the officers of the Crown on such a point would inevitably fail. During the seven years immediately preceding the accession of Elizabeth, the Dean and Canons had regularly accounted annually with the Lord Treasurer for the rents of the lands (other than those conveyed to them for their own sole use) at the full value at which they had been rated by the Court of Augmentation, when they were conveyed to them in the first year of Edward VI., i. e. at the full annual value
of 600*l.* * And it is absurd to suggest that in the very next * 420
year following these accounts they should attempt to impose on the officers of the Crown, by stating the value at a sum different from that at which, up to that time, they had been regularly charged in account. Besides, in the State Paper Office, is a paper dated the 5th of July, 1559, which was a few weeks only before the letters-patent and book of Elizabeth purport to bear date, which paper contains a detailed account of what is described as the "yearly limitation and distribution of the revenues of the lands appointed for the maintenance of thirteen Poor Knights at

Windsor, and for the farther performance of the testament of the most noble King Henry VIII., father of the Queen's most excellent Majesty." The paper then gives, in detail, the mode in which it was then proposed to apply 436*l.* 2*s.* 8*d.* for the benefit of the Poor Knights and the other charities, nearly the same as was afterwards followed in Elizabeth's book; and it concludes thus: "and so remaineth of 600*l.* to the disposition of the Dean and Canons, and for these needful reparations and service about the said lands to be yearly sustained, 163*l.* 18*s.* 4*d.*"

After this, I think it is impossible not to be satisfied that the Crown officers knew perfectly well the true state of the case; namely, that a particular part of the lands conveyed to the Dean and Canons, as being of the annual value of 600*l.*, had been set apart to answer the will of Henry VIII., as far as the Poor Knights and the other charitable objects were concerned. Why this course was altered, when the final settlement of the scheme took place on the 30th of August, 1559, I cannot discover from the evidence; but I confess it appears to me much more probable that in-
* 421 justice was done to the Dean and Canons * than that any deception was practised on the Crown; for it will be observed that, although a considerable part of the lands and hereditaments conveyed to the Dean and Canons by the letters-patent of Edward VI. certainly belonged to them, free from any claim on the part of the Poor Knights, yet the whole is treated in the indenture and book of Elizabeth as having been given for the use of the Poor Knights.

The language of the indenture is as follows: "This indenture witnesseth, that when divers manors, &c., contained in a schedule hereunto annexed, being of the clear yearly value of 600*l.* and above, are given and assured unto the said Dean and Canons, to the intent that the revenues thereof should be for ever employed and bestowed for the maintenance of thirteen Poor Knights, &c., &c., as mentioned in the annexed book; the said Dean and Canons covenant that they will employ the revenues of the said manors, lands, &c., &c., according to the book." This was a palpable misrepresentation. The lands, &c., contained in the schedule comprised the whole of the property conveyed to the Dean and Canons; and it was not true that those lands had been, i. e. that all of them had been, assured to the Dean and Canons for the benefit of the Poor Knights: though the Dean and Canons, if they

had executed the deed, would have been estopped from saying that such was not the truth.

It is not wonderful, therefore, that the Dean and Canons should have declined to execute that indenture. There is clear evidence to show that the Dean and Canons always contended that the valuation put on the lands was too high, the charges on them being understated. There is a memorandum to that effect in Fryth's Register. And that their complaint was not without foundation is manifest; for * during the seven years im- * 422 mediately preceding the execution of Queen Elizabeth's indenture and book, and during which, as I have already stated, we have the accounts regularly rendered to the Treasury, and audited, so far as relates to the lands set apart to answer the 600*l.* per annum, it appears that the net value of those lands, after satisfying charges, was for the whole seven years only 2600*l.*, i. e. 371*l.* annually. When, therefore, it was resolved to fix the charges for the Poor Knights and other charitable objects at a sum of 430*l.*, or thereabouts, it became a matter of great importance to induce the Dean and Canons to consent to bring all the lands into a common fund; and I can well understand the observation of Chief Justice Popham and Sir Edward Coke, when deciding, in the reign of James I., that the Dean and Canons were not bound to make certain of the payments claimed against them under the book of Elizabeth; they say that "the late Queen intended to have drawn the Dean and Canons to have consented thereto" (i. e. to the payments directed by the book) "by sealing and delivering of their counterpart," but which they affirmed they had always refused to do. They probably felt that their claim, under the will of Henry VIII., was one which might be successfully resisted. And to the officers of the Crown, acting for the Poor Knights and the other charitable objects, it was a matter of indifference, when once the whole of the lands had been made subject to the charges, whether the annual value of them was stated to be 812*l.* 12*s.* 9*d.*, or 661*l.* 6*s.* 8*d.* Even at the lower rate, a surplus would, according to the book, remain for the Dean and Canons, though, as they well knew, the amount of that surplus as given in the book was illusory; because, as stated in Fryth's Register, and as had been made manifest by the accounts during * the seven years preceding the * 423 reign of Elizabeth, the charges were greater than were expressed. Be this as it may, I cannot arrive at the conclusion that

this lower rating in Elizabeth's book, adopted, it will be observed, by the Crown, and conformable to a paper in the State Paper Office, dated 5th July, 1559, affords any ground for concluding that the real value of the property was not known to the officers of the Crown. On the contrary, the evidence satisfies me that it must have been known to them, and that the reason why all the lands assured to the Dean and Canons were included in the deed and book of Elizabeth was, that the experience of seven years had shown that the lands originally set apart to satisfy the 600*l.* per annum would not, according to the value put on them by the Court of Augmentation, afford a certain annual revenue sufficient to answer the charges comprised in the book of Elizabeth. Having, as they hoped, obtained adequate security for the due payment of those charges, the officers of the Crown left, and intended to leave, the surplus to the Dean and Canons for their own use. I have, therefore, come to the conclusion that, whether the rights of the Dean and Canons are to be governed by the will of Henry VIII. or by the book of Elizabeth, the revenues belong to them, subject only to the obligation of making the pecuniary payments to which they are liable.

This is the mode in which the revenues have been dealt with during three centuries; and though, if it could have been shown that throughout this long period of time there had been a continual breach of trust on the part of those whose duty it was to administer this charity, the Court of Chancery might have had the means of doing justice at last, yet I feel, with Lord Eldon, * 424 that such a continued * usage is not to be overlooked when we are trying to discover what was the intention of those who founded the charity. The evidence before us, and all the probabilities of the case, seem to me to lead here to the same result, namely, that the usage has been in conformity with the original foundation of the charity; that whether the foundation of the charity is to be attributed to the will of Henry VIII. or to the indenture and book of Elizabeth, in either case the true intent of the founder, to be collected from the instruments of the foundation, was, that certain specific pecuniary benefits should be conferred on the Poor Knights, and that, subject thereto, and to some other charitable objects, the lands should form parcel of the general property of the Dean and Canons.

On these grounds, I think that the decree of the Master of the Rolls ought to be affirmed.

LORD WENSLEYDALE.—The main question here is, whether the Dean and Canons are entitled to the surplus rents and profits of the property conveyed to them by Edward VI., over and above what is required to pay the stipends of the Military Knights, formerly the Poor Knights of Windsor, and the charges payable by them in favour of other persons and objects, as the respondents contend; or whether, as the Attorney-General insists, the lands and hereditaments (except those granted to them in recompense for lands previously granted by them to the Crown) were granted on charitable trusts indicated by the will of Henry VIII., and the indenture of 4th August, 1557, and the supposed indenture and book of Elizabeth; and whether all the objects of such charitable trusts are entitled to participate proportionally in the improved rental.

* I have given the evidence and arguments on both sides * 425 the most careful consideration in my power, and in the result have quite satisfied myself that the decree of the Master of the Rolls in favour of the respondents is right, and that the information filed by the Attorney-General ought to be dismissed.

One cannot doubt that the donors of the property in question, if they had foreseen the vast increase in the pecuniary value of land since the date of the grant, would have made a much more liberal provision for the objects of their charitable intentions. If the Court of Chancery could now by law make a fresh disposition of the rents and profits, it is not possible to suppose that it would not increase the stipends of the knights, so as to enable them to live in a manner more suitable to their honourable position in society, instead of confining them to the poor pittance which they now receive. And in considering the case, one cannot help feeling a desire to be able to find some good reason for such a course. But we must perform our duty by endeavouring to stifle that feeling altogether, and decide according to the strict rules of law.

That decision depends upon the construction of the different instruments by which the lands, &c., were conveyed, and their rents disposed of, upon the words of the instruments themselves, and such other evidence as is allowed to explain written documents.

The material instruments are,—1. The will of Henry VIII. 2. The indenture of 4th August, 1557, between Edward VI., the Lord Protector Somerset, the executors of Henry VIII., and the Dean and Canons of Windsor. 3. The conveyance of Edward VI., of

the 7th October, 1557. 4. The alleged indenture and book of Elizabeth.

* 426 * The first, and in my mind by much the most important, instrument, is the will of Henry VIII.; for it was to carry the intention of that King, expressed in that will, into effect, that the indentures of Edward VI. and the alleged indenture and book of Elizabeth were executed. The construction of the will is a key to the meaning of the other instruments; and if the will meant that the Dean and Canons should have the property conveyed to them out and out, and that they should, in consideration thereof, perform the condition of paying certain sums to the Poor Knights and others, and doing other things, the same construction ought to be put, if the words would admit of that construction, as they certainly may, on the subsequent deeds.

Now, I have entirely satisfied myself that the meaning of the will of Henry VIII. was, not that the Dean and Canons were to hold the property conveyed in trust to apply the rents to the different purposes mentioned, and to be afterwards defined, but they were to have the property, and by way of compensation for it to perform certain conditions imposed upon them.

The will provides — [His Lordship gave a summary of it.]

All these acts are to be done by the Dean and Canons; no sums are stipulated to be paid to them for any of their religious services; the only compensation to them was the enjoyment for ever of the lands, &c., to be granted. And it seems to me to be clear that the intention was that the contemplated grant was to vest the property in the Dean and Canons absolutely and for ever, in order to enable them to perform the conditions, and not to create a trust to apply the annual produce to the Poor Knights and the other objects named. And the value of the property to be

* 427 * granted, which might consist in part of spiritual promotions, is in favour of the same conclusion, for they would not necessarily produce any annual income to the Dean and Canons, but only to the incumbents to be appointed by them.

The indenture which the King intended to be prepared was for the performance of all the expressed conditions, and of all other things contained "with" the same, or, if we read it as is stated in the minute, "within." Whichever is the word, the meaning, I think, is the same; that the indenture was to give mere details of the manner of performing the conditions, ordinances, and rules,

as stated in the indenture of Edward VI., made for the purpose of carrying the will into effect, probably with such variations as the change of religion might require, and not to authorise the application of any part of the revenues to totally different purposes from those specified.

Henry VIII. died in January, 1546–47, soon after the will was executed; and on the 4th August following, the indenture of that date, between Edward VI., the Lord Protector, and the executors of Henry VIII., and the Dean and Canons, was executed. It recites — [His Lordship stated it.]

The intention appears to have been that the indenture should contain the details of what is more generally stated in the will of Henry VIII. Part of it is obscure. It probably was meant to reserve to the donors the power to leave the Dean and Canons to select the lands of which the rents, to the amount of 600*l.* per annum, were to be applied, or to select them themselves afterwards. It cannot be construed to reserve the power of altering the general purposes expressed, and applying the whole rents otherwise than according to the will of Henry * VIII., the fulfilment * 428 of which was the main object of the deed.

On the 7th October, 1557, Edward VI., reciting that he was willing and conscientiously desirous in all things to fulfil the will of his father, and in completion of the covenants contained in the deed of the 4th August, 1557, conveyed divers manors, rectories, churches, and tithes, particularly enumerated in the deed, to hold to the only proper use of the Dean and Canons in frankalmoign, subject to the rent of 52*l.* 10*s.* 5*d.* per annum. And the grant also stipulates that they and their successors should have and enjoy, and convert to their own proper use, the said prebends, rectories, churches, chapels, and spiritual profits and hereditaments whatsoever, and the bygone profits, without account, from the preceding Michaelmas.

If the case had rested here, and no other indenture had been executed, I cannot help thinking that the title of the Dean and Chapter, upon the evidence, would have been complete. The absolute interest was vested in them by the indenture of 7th October, 1557. The conditions had been specified in substance in the will of Henry VIII. and the deed of 4th May, 1557, and the only deficiency would have been the want of an instrument containing details of the mode in which those conditions were to be

executed; and in the absence of such an instrument and of any additional condition (if indeed the power of imposing such was reserved by the will and deed of 4th August, 1557), after the proof of user which is in evidence, I cannot but think that the Dean and Canons would have taken the estate beneficially, and not upon trusts to be afterwards declared.

In that point of view, it would not be necessary to inquire * 429 into the fact of the execution of the alleged indenture * and book of Elizabeth, or their precise terms, or the execution of them by the Dean and Canons. But if I am wrong in my impression that the title of the Dean and Canons was good if no subsequent indenture was executed, and it is therefore necessary to determine the question of the existence and effect of the instruments alleged to have been executed by Elizabeth, I think there is reasonable evidence of their existence and contents.

It certainly appears that no such indenture was enrolled, as it ought to have been, but there is strong evidence of its existence in contemporaneous and subsequent documents. There are so many assumed copies in places where they are likely to be if true, that I feel no doubt of the existence of an original; nor do I think that there is any question as to the authenticity of the copies preserved in the Chapter House at Westminster, and of those in Fryth's Register, and in the Ashmole Collection, and in the British Museum. I may add that, in the twenty-third and subsequent articles of the information itself, the indenture and book, and their contents, are fully stated, in conformity with the above-mentioned copies. It was argued that the Attorney-General was not bound by that statement as an admission. I was not satisfied of the truth of that position upon the authority of the cases cited; but I think it not absolutely necessary to decide that point, being satisfied on the evidence that the indenture and its contents are sufficiently proved.

Whether the Dean and Canons also executed the instrument on their part, or not, as Elizabeth meant them to do, I am not satisfied, but I think it immaterial to the decision of this case.

It seems to me, if any instrument was necessary to com- * 430 plete * the grant of Edward VI., by making ordinances, that, as Edward VI. did not execute it, it remained in the power of Elizabeth to do so, in right of her Crown. It was not, I think, a personal right of the then King, or the executors of the late King. Elizabeth had whatever right remained in the Crown;

that is, a right to make ordinances regulating matters of detail, and to make additional conditions, if indeed the indenture of the 4th of August reserved that power. On either of these suppositions the question resolves itself into an inquiry into the effect of the instrument of the 30th August, 1558, in the first year of her reign. This indenture recites — [His Lordship stated it.]

The order and rules for the establishment and good government of the Poor Knights are then stated at length. Then the Queen's ordinances for continual charges, enumerating payments for obits, clerks, queristers, bell-ringers, doles, 18*l.* 5*s.* for each of the thirteen knights; the governor, 3*l.* 6*s.* more; then 16*l.* 18*s.* for their gowns; 21*l.* 13*s.* 4*d.* for their mantles; and the total is said to be 430*l.* 19*s.* 6*d.* Then follows a list of the lands appointed for the said charge, with sums opposite each, the total of which is said to be 661*l.* 6*s.* 8*d.*; and then follows the important clause, upon the construction of which the case, in that view of it, may be said mainly to depend,— "Which said lands," &c. — [His Lordship read it; see ante, p. 377.]

In the copy in the Ashmole Museum, which purports to bear the signature of Elizabeth and of Sir William Cecil, these words are added to the last clause: "in maintenance and defence of the said lands." It is not very important whether these words are included or not.

What, then, is the construction of this clause? If it is * construed in connexion with the will of Henry VIII., and * 431 as intended, as is stated, to be a disposition according to the mind and will of that King, I cannot feel any doubt that it meant to give the surplus profits of the lands, &c., conveyed by Edward VI., after satisfying the several payments, expressly called charges. Even when construed without the aid of that will, and taken alone, my opinion is, that the reasonable construction of the clause is to give all those surplus profits to the Dean and Canons, after satisfying those charges. All these cases depend entirely upon the intention of the founder, to be collected from the words of the instrument of foundation, coupled with the evidence of the then existing facts and other admissible evidence, to enable the Court to construe documents; and if from these you can collect the intention to give to the objects of bounty aliquot portions of the income, those portions will be increased as the total income increases. For instance, where lands of a known rental are given

to pay thereout sums which, together, exhaust the whole rental; as if where the rent is 100*l.* per annum, and ten payments of 10*l.* each per annum were directed to be made (which was the principle on which the *Thetford School Case*[1] was decided), then it may be considered that the donor has said that the rents are to be applied in those proportions. Generally speaking, the founder may be supposed not to have contemplated the alteration of the value of money, though we, in looking back upon past times, and knowing that it has diminished greatly, are apt to imagine that he might have done so. Here I think it is impossible to say that Elizabeth did contemplate at that time the probable diminution of the value of money, or she would more distinctly have provided for
* 432 such an event. But still, if she had * intended for any reason to give aliquot portions of the revenue to each, whatever her motive may have been, the increased profits would have been shared by each party beneficially interested. But I think it cannot be held that she meant to be given aliquot portions of the whole proceeds to each of the Poor Knights, that is, that proportion of the actual rents and profits from time to time which 185 bears to 661*l.* 6*s.* 8*d.* Could she mean to give a similar proportion for their red gowns or mantles, or to bell-ringers? All the lands, the annual value of which is computed to be 661*l.* 6*s.* 8*d.*, are directed to remain to the Dean and Canons and their successors for ever; for the maintenance of the charges expressed to be continual charges, certain specified sums, none of them indefinite, amounting, together, to 430*l.* 19*s.* 6*d.* annual value. These lands include what is termed the old as well as the new dotation; all of them are given. The residue of the lands, stated to be 231*l.* 6*s.* 8*d.* annual value, are to remain to the Dean and Canons, for priests' wages, &c., being all indefinite charges, and for the relief of the Dean and Canons and their successors. The statement of the computed value of the residue will not prevent that residue, whatever it may amount to in future years, from passing to the grantees.

This circumstance occurred in the case of *Corporation of Beverley* v. *The Attorney-General*,[2] and was held properly to make no difference. The lands subject to the charges are clearly given, and the residue of the rents, after satisfying them, stated. It is

[1] 8 Rep. 130 *b.*

[2] 6 H. L. Cas. 310.

impossible, I think, to collect that Elizabeth meant the rents from time to time to be divided, in the proportion of 430*l.* 19*s.* 6*d.* to 231*l.* 6*s.* 8*d.*, the former to be paid to the persons in *whose favour the charges are made, the latter to the Dean *433 and Canons.

I am of opinion, therefore, that, upon the true construction of this last clause, the charges are fixed charges, and that the residue belongs to the Dean and Canons. But all doubt on that subject is removed by reading this clause with the aid of the will of Henry VIII., which certainly intended to give the estate out and out to the Dean and Canons on condition of their doing the things mentioned in that will.

It is not necessary to say much on the usage that has been adopted by the Dean and Canons and the Crown since the indenture and the book were made. The Dean and Canons did not, I think it is probable, execute the indenture themselves, but they have constantly made the great majority of payments required by the book. Their stewards have received and accounted to them for all the rents and profits. The Dean and Canons have accounted to the Treasurer of the Garter occasionally, that is, three times, as they ought to have done by the directions in the book. They have once accounted before the Auditors of the Exchequer in 13 Eliz., 1571, on what occasion does not appear; but they claim a balance then due to them, and admit one to the Crown in 5 Car. 1, 1630. Why that was done we do not know; but in it they claim the surplus; and, generally, on a fair view of all the evidence, they must be considered as having acted as if the surplus belonged to themselves. It is quite unnecessary to say whether this practice and usage, with the knowledge of the Crown, would of itself constitute a case for them, but being in accordance with what I consider as the true construction of the instruments out of which their right arises, it gives it confirmation and support.

*This view of the case makes it unnecessary to consider *434 several of the matters argued at your Lordships' bar, and confirms the decision of the Master of the Rolls upon the case as presented to him, and stated in the information, and in the appeal cases of all the appellants.

But in the argument before your Lordships another point was made, not discussed in the Court below. No doubt it is competent

for the appellant so to do; but such a case must be looked upon with some suspicion.

The new case is, that the indenture of Elizabeth and the book are avoided by the fraud and misrepresentation of the Dean and Canons, in wilfully misrepresenting the true amount of the rents and produce of the property which had been conveyed to them by Edward VI.; or if they were not guilty of that fraud, the indenture of Elizabeth was still void, as being founded on a false recital of the value of the lands, &c., as it is suggested that an original grant of the Crown would be.

If this indenture is void, it is said that the Crown now has the power of directing the application of the rents and profits according to the true intention of the grant of Edward VI. If that grant is solely for the benefit of charity, the appellant, the Attorney-General, ought to succeed; if not, it remains in the Crown to be disposed of by the sign manual, and the information ought to be dismissed on that ground.

But I do not think that the case of a fraudulent representation or concealment of the real value of the rents and profits by the Dean and Canons is made out in any degree.

There certainly had been misapprehension and mistake on the part of Elizabeth. She supposed lands of the value of 600*l.* * 435 per annum and more to have been given and * assigned by Henry. VIII. to the Dean and Canons, and not by Edward VI. Had it been a formal grant from the Crown of lands supposed in the grant to be derived by it in one way, as, for instance, by escheat, but really derived in another, the grant would have been void; Comyns' Digest;[1] but this instrument, by which nothing passes from the Crown, cannot be construed so strictly; and this objection, on this ground, was not pressed at the bar. For the same reason, I think the errors in the valuation of the lands, &c., all of which had already passed by the grant of Edward VI., are not material. The identity of the lands is fully established without reference to the amount of alleged rents. There can be no question as to the lands, the rents, and profits of which are disposed of by the book. How these precise sums were mentioned cannot be made out. The instrument is no doubt very inaccurate. The charges are said to be 430*l.*, in the concluding direction, which

[1] Grants, c. 9.

are added up on the face of the instrument as 420*l.* 19*s.* 6*d.* The amount of the charges correctly added up is 428*l.* 10*s.* 10*d.* But these inaccuracies do not lead to any uncertainty as to the real amount of the charges, or create any doubt as to the property, the rents of which are disposed of.

It is not at all necessary to give an opinion as to the conduct of the Dean and Canons on the references in the time of James. I. to Lord Chief Justice Popham and Sir Edward Coke, or on the reference to Sir Dudley Ryder in the reign of George. II.

I do not think that any fraudulent conduct on the part of the Dean and Canons is established. The award of Lord Coke and Lord Chief Justice Popham shows that they relied on the grant of Edward. VI. to them absolutely, and * that no * 436 farther charges could be imposed on them without their consent; which view seems to me to be quite correct. In like manner, on the reference to Sir Dudley Ryder in 1735, he was of opinion that the Dean and Canons were entitled to the estates, independently of the indenture of Elizabeth; which view I am strongly inclined to think was correct. And whether the indenture of the 4th August, 1547, was kept back by fraud or not (which is not clear) is immaterial; it may have been, but we now have it, and can form our opinion upon the whole case.

I think the effect of the different instruments is to establish the right of the Dean and Canons to the surplus; and therefore the decision of other points arising on the case becomes unnecessary.

LORD CHELMSFORD. — My Lords, I should have been satisfied with merely stating my concurrence in the opinions which have been delivered by my noble and learned friends who have addressed the House, if I did not feel that the great importance of the case, involving rights which have existed in an unsettled state, and have been the subject of contest for more than two centuries, scarcely leaves me at liberty to withhold the reasons which have led my mind to the same conclusion at which they have arrived. Your Lordships are called upon to adjust and determine the rights which are alleged to exist to portions of the revenues and profits of certain parsonages, tithes, and lands received by the Dean and Canons of Windsor under a grant from the Crown in the reign of Edward. VI. The claims of four distinct parties have been brought forward and enforced by long and elaborate arguments. That

which has been most prominently urged is the case of the
* 437 Military Knights, or, as * they are popularly called, the Poor Knights of Windsor, who, having originally had assigned to them a small annual stipend for their maintenance, claim to have an augmentation of their allowance out of the largely increased revenues now derived from the lands by the Dean and Canons. The Attorney-General supports the claim of the Poor Knights to this addition, but also contends in opposition to the Dean and Canons, that whether the knights are entitled to a larger share or not, the residue, after satisfying the objects to which the revenues are applicable, must be applied to charitable purposes, according to a scheme to be framed by the Court of Chancery. The Solicitor-General claims the residue as being undisposed of as a resulting trust in favour of the Crown. And the Dean and Canons of Windsor insist that, after having satisfied all the charges upon the lands, the surplus or residue of the profits, to whatever extent they may have increased, belongs to them absolutely for their own benefit. In the course of the argument, various authorities were cited, from which certain general rules were deduced for the interpretation of gifts to charities. No case on this subject can, however, be a governing precedent for any other, because, as it was admitted, the whole doctrine of charitable gifts ultimately resolves itself into the intention of the donor. This was the view of the House in the *Southmolton*[1] and *Beverley Cases*,[2] in the latter of which it was said that "each case, when we have to apply the doctrine, must stand on its own ground, and that whatever may be the force of certain expressions standing alone, the whole context of the instrument must be regarded to determine the meaning in each particular instance."

* 438 * In endeavouring to satisfy the intention of the donor in this case, it will be necessary to obtain a clear understanding of the will of Henry VIII., for although as I think nothing passed to the Dean and Canons under that will, yet all the succeeding instruments have reference to it, and profess to follow and carry out its object. To aid in its interpretation, it is essential to ascertain the relation in which the Poor Knights stood to the King at the time, and also to consider the claim which the Dean and Canons may have acquired to the royal favour. The Poor Knights

[1] 5 H. L. Cas. 1. [2] 6 H. L. Cas. 310.

appear to have been established originally by Edward III. as an appendage to St. George's Chapel, or College (as it is sometimes styled), and were, with the warden, canons, and other ministers of the chapel, intended to be perpetually supported of the goods of the chapel for the celebration of the Divine offices for the King, his progenitors, and successors; and for this cause, the King gave the right of patronage and advowson of three churches, and willed that the warden and canons, knights, and other ministers of the said chapel, that should serve therein, should be paid every year so much only from the treasury as, together with the emoluments arising from the aforesaid churches, should seem to be sufficient and honest for their diet and support of the charges incumbent upon them, according to the decency of their condition in the meantime, until there should happen to be provided from the immovable goods, lands, beneficies, or rents to a suitable sufficiency and to his honour, unto the sum of 1000*l.* yearly, all which the King promised and undertook for himself and his heirs effectually to fulfil. When the Order of the Garter was instituted, and the statutes for the government of the order were made, the canons and the knights (the latter being increased in number from twenty-four to twenty-six according * to the number of the Knights Com- * 439 panions of the Order) were ordained to form part of the institution. But although it was provided that the twenty-six veteran knights should have "a competent exhibition continually to serve God in prayers," yet no permanent provision was made for their support and maintenance for many years, and they remained upon the footing of their first establishment by the letters-patent of the 22 Edw. 3.

The emoluments of the churches given by these letters-patent were at the time not regarded as sufficient for the purposes to which they were to be applied, and it is probable that the money which was to be received from the treasury was not very punctually paid. It is evident that the warden and canons made some remonstrance on the subject, for in the 22d year of Edward IV. an Act of Parliament was passed which incorporated the warden and canons as the Dean and Canons of the King's Free Chapel of St. George, and which, after reciting the first foundation of the chapel by Edward III., ordained that the Dean and Canons, who were, however, left with the advowsons of the three churches granted to them by Edward III., should be exonerated altogether from the

obligation of maintaining the Poor Knights, for whom, however, notwithstanding an allegation in the Act, no other provision seems to have been made. This relief given to the Dean and Canons by Parliament, afforded them no sufficient protection against the encroachments of the Crown, for Henry VIII. afterwards took upon himself to grant letters-patent to one Peter Narbonne, for a Poor Knight's exhibition in the college. This usurpation afterwards occasioned a sort of compromise between the Dean and Canons and Henry VIII., upon which the Dean and Canons, for the contentation of the King's mind, and to do him pleasure, granted to Peter Narbonne, in relief of his poverty, an annuity of twenty
* 440 marks * during his life, for which the King gave them right hearty thanks, and promised, therefore, to be better lord to them in any of their reasonable suits thereafter. By an indenture made between them, reciting these facts, the Dean and Canons agreed to grant the annuity of twenty marks to Narbonne, who thereupon surrendered the patent which had been granted to him by the late King. This arrangement appears to set in a very strong light the favour with which the King regarded the Dean and Canons, and was in itself calculated to increase their claim to the royal consideration. Another transaction which took place between them must also have contributed to make the Dean and Canons special objects of the King's regard at the time when he made his will. For some reason the King had desired certain possessions of the Dean and Canons called the Manor and Rectory of Ivor, in the county of Bucks, and the Manor of Damarey Court, in the county of Dorset, which had been conveyed to the King upon his promise to give the Dean and Canons other hereditaments of equal value in exchange, which promise was unperformed at the time of the King's death. Under these circumstances the part of the will relating to the Dean and Canons and the Poor Knights was made. The particular clauses have been so often stated that it is unnecessary to repeat them at length. It is sufficient to say that the Dean and Canons were to have lands of the value of 600*l.* made sure to them and to their successors for ever upon certain conditions, which were to be contained in an indenture, and which were expressed to be that the Dean and Canons should find two priests to say masses, should keep yearly four obits, and at every of them cause a sermon to be made, and at the same obits give 10*l.* in alms, and give yearly for ever to thirteen poor men, to be called Poor

Knights, twelve pence a day and a gown, and every Sunday in the year cause a sermon to be made.

* Now, suppose that this will had been carried out accord- * 441
ing to the apparent intention of the King, by an indenture passing in his lifetime between him and the Dean and Canons, what would have been the nature of this indenture? I apprehend that it would have created between them what Littleton (section 137) calls a tenure by Divine service; the instances of this sort of tenure which he gives being precisely of those services which are required by the will to be performed; viz., "to find a chaplain to sing a mass, or to distribute in alms to poor men." There can be no doubt that when such a tenure is created, the lands pass to the grantee, with a reservation of the services, which may be distrained for if unperformed. But the grantee, subject to the services, is absolutely entitled to the lands; and unless the Dean and Canons were to have the lands for their own benefit, they would have received no consideration at all for the onerous services which were to be imposed upon them. Henry VIII., however, died without having carried out his intentions towards the Dean and Canons, and they remained to be completed by his executors. They lost no time, after his death, in preparing to obey the injunctions so solemnly laid upon them by the will, in order that the indenture and assurance to be made between the Dean and Canons and them might be put in execution. And it was upon consideration of the very terms of the will itself that the advice of the Judges and other learned persons was given as to the manner and form in which the will might be fully executed and performed. Before, however, the indenture which they recommended could be prepared, as the Dean and Canons were to have lands of the yearly value of 600*l.* made sure to them, and as the will had also provided that all such recompenses for exchanges as ought to have been made by the King, and be not yet accomplished, should be perfected in * every point, and the Dean and Canons had * 442
received nothing in exchange for their possessions of Ivor and Damarey Court, it was necessary first to select and value the lands which were to be included in the proposed indenture. Accordingly, the particulars of the intended grant were selected, and the valuation of them made under the directions of Sir Edward North, the Chancellor of the Court of Augmentations. This valuation amounted to 812*l.* 12*s.* 9*d.*, which was distributed in the

following manner: 160*l.* 2*s.* 4*d.* for the manor and parsonage of Ivor and other lands; 600*l.* in accomplishment of the will of Henry VIII.; and the remaining 52*l.* 10*s.* 5*d.* to be reserved in a yearly rent, in lieu of the tenth. The indenture tripartite was then executed upon the footing of this valuation, and all the lands particularised and valued were granted to the Dean and Canons and their successors, to hold of the King, his heirs and successors, in free alms, yielding the rent of 52*l.* 10*s.* 5*d.* This, it may be observed, was an incorrect description of the nature of the tenure, as no rent can be reserved upon a grant in frankalmoign. The Dean and Canons covenanted to bestow and employ the rents, revenues, and profits of so much of the prebends, parsonages, and other the premises to be granted to them as shall amount to the yearly value of 600*l.*, or of so much thereof as to the executors shall be thought meet and convenient, in and about such acts, ordinances, intents, and purposes as by the King and the executors should be prescribed, limited, and applied in the separate indenture thereafter to be made. This covenant is rather ambiguously worded, but as it was never literally acted upon, it is unnecessary to determine whether, upon the proper construction of it, the Dean and Canons would have been bound to have set apart and appropriated a portion of the prebends, parsonages, and other the premises to * 443 supply the * requisite amount to be applied to the prescribed purposes, or would have had merely to bestow and employ 600*l.* out of the whole of the rents, or so much less than that amount of the rents as the executors should think meet and convenient. There can, I think, be no doubt that under this covenant the King and the executors might have ordered the application of the whole of the 600*l.*; and, as it appears to me, even to purposes not conformable to the will of Henry VIII., although the obits and the alms prescribed by the will would not have absorbed that amount, and were probably not expected nor intended to do so. And this appears to have been the view entertained of this covenant by all parties, for although the intended indenture was never executed, the Dean and Canons, during the reign of Edward VI. and of his successor, admitted their liability to apply the whole 600*l.* according to the directions of the Crown, by accounting regularly for the full sum, and paying that amount either to the treasurer or upon orders given by him for various matters, some of which were not connected with the objects specified in the will of

Henry VIII. Thus, upon different occasions, they were directed to pay towards the charges of a conduit at Windsor, and also for building lodgings for the Poor Knights; but although the expenses of these works, in some years, exceeded the 600*l.* (as appears from the accounts), they were never, upon any occasion, required to contribute or employ more than that amount.

Soon after the letters-patent of Edward VI., the Dean and Canons selected nine of the parsonages to represent the 160*l.* 2*s.* 4*d.*, the value of the exchanged lands, and the rent of 52*l.* 10*s.* 5*d.*; but the lands so selected were 42*s.* 1*d.* too much, and, therefore, in accounting to the treasurer they carried that sum over to the value of the remaining lands (597*l.* 17*s.*) to make up the 600*l.*, and * down to the first of Elizabeth they accounted * 444 to the Crown for the rents and profits of all the parsonages and lands (with the exception of the nine above mentioned) in this manner. During the whole of the time this sum of 600*l.* was applied according to special directions from time to time, no rules and ordinances having been made for its appropriation. But Elizabeth having, on the 28th of March, in the first year of her reign, appointed certain Alms Knights to make up the full number of thirteen, and having afterwards made an ordinance for their government, on the 30th of August in the same year, by indenture and letters-patent, she directed the mode in which the Dean and Canons were to distribute, employ, and bestow the rents, revenues, and profits of the manors, lands, tenements and hereditaments of the value of 600*l.*, which had been given and assured to them. It was made a question at one time whether the indenture and the letters-patent were ever in existence under the Great Seal, but there are such frequent and distinct recognitions and admissions of their existence in this form upon various occasions (as fully shown by my noble and learned friend, Lord Cranworth) that I think no reasonable doubt can be entertained upon the subject. If it had been necessary that these documents should be executed by the Dean and Canons, the case would have presented greater difficulties; for, although there are to be found instances in which they seem to admit their own execution of them, yet in the formal proceeding against them by the clerks of the Chapel of Windsor to obtain the pensions granted to them by Elizabeth, the report of the Attorney and Solicitor-General, to whom the matter was referred, states that the orders of Elizabeth were meant to have

tised upon the Crown as to the value of the lands. The indenture and letters-patent of Elizabeth contain no grant of the lands, but merely declare in what manner the rents and profits of these should be applied. And although the letters-patent erroneously state that the lands were given and assigned to the Dean and Canons by Henry VIII., yet this may be considered to have been substantially correct, as the grant of Edward VI. is expressed to be "in completion of the promises and bequests made in the King his father's will." Now, it is impossible to believe that this transaction could have been completed without the knowledge of the tripartite indenture of Edward VI., by reference to which it would appear that the lands mentioned by the Queen as appointed to the charge, which are all the lands granted by Edward to the * 448 Dean and Canons, were covenanted to * be of the value of 812*l.* 12*s.* 9*d.*, and not of 661*l.* 6*s.* 8*d.* And from this tripartite indenture the persons preparing the instruments would necessarily be led to the valuation of Sir Edward North, which was amongst the records of the Court of Augmentations, and would thus obtain full evidence of the estimated value of the lands. Even supposing, therefore, that a false suggestion that the lands were of less value than they really were, would, according to the authorities cited by the Solicitor-General, have rendered void the direction for the application of the rents of the lands, as in the case of a grant from the Crown induced by false suggestion, yet (though I cannot explain the reason why a lower value of the lands should have been adopted) from the nature of the transaction I am satisfied that no deception in this respect could possibly have been practised by the Dean and Canons upon the Crown. But however difficult it may be to ascertain the true state of facts as to the value of the lands assumed by the ordinance of Elizabeth upon any view of the matter, it was not very material to either of the parties. All that the Crown was interested in securing was, that there should be value sufficient to cover the charges to be imposed; and as all the lands contained in the grant of Edward VI., and not merely selected portions of them, were to be a security for these charges, and as there could be no doubt that the whole of the lands was amply sufficient for the purpose, it was of no importance whether the value of 661*l.* 6*s.* 8*d.* or of 812*l.* 12*s.* 9*d.* was taken, either amount being ample to satisfy every obligation which the Dean and Canons would have to discharge. On

the other hand, the Dean and Canons, who had been acquiescing for many years in Sir Edward North's valuation, and who were to be made subject to charges to a less amount than they were liable to upon their covenant, would naturally be indifferent to whatever * value might be assumed as the basis of the * 449 Queen's ordinance, if they knew they were in possession of lands of sufficient value to meet the charges to be laid upon them. But whatever may be the correct view of the question, there can be no doubt that, from the moment of the existence of the indenture and letters-patent of Elizabeth down to the present time, they have been recognised and submitted to. As soon as they were made, the Dean and Canons proceeded to alter their mode of accounting in a very striking and significant manner.

They had down to that time (as already shown) distinguished between nine of the parsonages and the rest of the lands, and had accounted to the treasury for the 600*l.* a year out of rents of all the lands except these nine parsonages. But the charges upon the lands were now specifically ordained by the Crown, and the Dean and Canons immediately proceeded to apply the rents in the manner prescribed by the ordinance, and apparently with entire submission to the duties it imposed upon them. They ceased altogether to account to the treasury and to distinguish between the nine parsonages and the rest of the lands in their accounts between themselves, as the distinction had become wholly immaterial. It was insisted, however, by the counsel for the Poor Knights, that after this period they kept two sets of accounts, a true account for themselves, and a false account, which was rendered to the Crown. But no accounts were rendered to the Crown after the first year of Elizabeth. Those which were supposed to be such were made under an order of the Queen that, "yearly at the feast of St. George at Windsor, her lieutenant, with other companions of the Order of the Garter, should see the just account of the lands and how the revenues thereof were expended, and how the several payments above mentioned were duly paid." And the * accounts thus rendered were not of receipts, but of pay- * 450 ments only, for the fixed sum of 661*l.* 6*s.* 8*d.* is always taken as the total of rents appointed to the charge. It seems quite clear that after the indenture and letters-patent of Elizabeth, the Dean and Canons always acted as the absolute owners of the lands granted to them by Edward VI., subject to the payments which

were prescribed by the Queen. And their right, which was openly asserted from time to time, was never seriously contested. In particular, in their dispute with Mr. Hatch (who claimed part of the lands), which dispute occurred in 1574, between fifteen and sixteen years after the date of the indenture and letters-patent of Elizabeth, they distinctly allege their title in a manner to challenge attention. They say, "We received of Edward VI. parsonages, &c., valued at per annum 661*l.* We disburse to uses limited by covenants with her majesty per anuum 439*l.*, whereof peculiarly to the Poor Knights 288*l.* 6*s.* 8*d.*;" and after detailing various payments which they are required to make, they end with these words, "for which we have no means but by fines of these lands and improvements of rents." It is to be observed that the payments to which the Dean and Canons refer are those which are charged upon them by the letters-patent of Elizabeth.

During the whole of this long period, then, although the value of the lands had very considerably increased, no claim was ever made by the Crown for its own benefit, or to have the surplus rents applied to charity, nor, by the persons in whose favour the charges were imposed upon the lands, to obtain a proportional augmentation of their stipends; except in the instance of the petition of the Poor Knights in 1735, which was referred to Sir Dudley Ryder, then Attorney-General, who reported that they had not made out a title to any share of the improvements in * 451 the * value of the lands. Indeed, the whole nature of the establishment of these knights is opposed to the notion of their ever becoming entitled to large incomes. In their original institution by Edward III., they are described as "Twenty-four Poor Knights," impotent of themselves, or inclining to poverty, to be perpetually supported of the goods of the chapel. In the will of Henry VIII. they are called "Thirteen poor men;" and Elizabeth's orders and rules for their establishment and government direct that the thirteen Poor Knights shall be taken of gentlemen brought to necessity, "having but little or nothing whereupon to live;" and also (which appears to me to furnish a very strong argument against their present claim) that, "if any of the Poor Knights, after his admission into that room, shall have lands or revenues fall unto him, to the yearly value of 20*l.* or upwards, he shall immediately, upon the coming of such lands or revenues unto him, be removed and put from the said room of a Poor

Knight, and another such as aforesaid taken to his place." After a very long and careful consideration of all the circumstances of this important case, I have arrived at the conclusion that there is no resulting trust for the benefit of the Crown; that there is no general dedication of the lands to charity; that the Poor Knights cannot claim any proportional augmentation of the sums payable to them by reason of the increase in the value of the lands; but that the Dean and Canons are entitled, under the grant of Edward VI., to the whole of the revenues of these lands, subject merely to the payment of the charges imposed upon them by the letters-patent of Elizabeth. I agree, therefore, with my noble and learned friends, that the decree of the Master of the Rolls is right, and ought to be affirmed.

*LORD KINGSDOWN. — My Lords, the question in this *452 case is, whether the Dean and Canons are seized of the lands in question, subject to the payment of certain specific charges, or whether they are trustees of the lands for the several objects of the charity, including themselves to the extent in which they are objects, and entitled to no larger share of the increased income than they were entitled to as the income originally existed.

I do not think that there is any doubt as to the rule of law. If the income of lands devoted to charitable purposes is apportioned by the founder of the charity in certain proportions amongst different objects, each object of the charity will be entitled to participate in the increased income in the same proportion, subject to the discretion of the Court of Chancery in settling a scheme to make alterations in certain cases, and within certain limits, which it is not, for the present purpose, necessary to consider. If, on the other hand, lands are given to a body which itself may be an object of charity, but subject to the payment of specific sums to other objects of charity, then the increased income will belong to the body which is entitled to the lands, and the other objects can claim nothing beyond the specific charges.

These rules are perfectly well settled, and founded on reason and justice; there is nothing inconsistent with them that I am aware of, in any of the decided cases, ancient or modern; they merely apply to charities the plain distinction between a gift to A. and B., as tenants in common, and a gift of an estate to A., charged with an annual payment of fixed amount in favour of B.

There is often, however, great difficulty in determining under which class of cases a particular gift falls; and the difficulty *453 in the present case is increased by the uncertainty * who is properly to be considered as the founder, and what are the instruments by which the decision is to be governed.

The charity originated in the will of Henry VIII. That will, it is true, neither conveyed, nor purported to convey, any thing; and the Master of the Rolls considers that the succeeding Sovereign "was under no obligation other than a moral one to comply with the will of his father." Assuming this to be so, the subsequent grant by Edward VI. was made expressly for the purpose of giving effect to this will, and must be construed, I think, with reference to this purpose.

What, then, is the effect of the will? What interest would the Dean and Canons have taken if the King had made to them a valid gift in the same language? I think no doubt could have been raised upon this point but for the words "all other things," used in relation to the deed of covenant to be executed by the Dean and Canons.

But for those words, it would be simply a gift of lands to the Dean and Canons, subject to the performance of certain services, and the payment of certain specific sums of money, the performance of which services, and the payment of which monies, were to be secured by the covenant of the Dean and Canons with the King's executors, unless it was entered into with the King in his lifetime.

The difficulty is supposed to lie in the words, "and for the due and full accomplishment and performance of all other things contained with the same in the form of an indenture, signed with our own hand, which shall be passed by way of covenant for that purpose between the said Dean and Canons and our executors, if it pass not between us and the said Dean and Canons in our life." Under this clause it is contended that the executors, after the King's death, had the power of altering the dispositions of *454 * the will, at all events to the extent of the surplus revenues left in the Dean and Canons. But, on looking closely to the language of the will, this is not, I think, the effect of it. The "other things" are to be contained in a writing, signed by the King himself.

The King reserved to himself the power of prescribing additional

conditions and regulations, and perhaps of making alterations by a writing in the form of an indenture under his hand, but he gave no such power to his executors. If any such additions or alterations were made by the King, then they were to be embodied in the indenture to be executed by the Dean and Canons; if no such alterations were made by the King, then the indenture was to be confined to the conditions already imposed.

This construction gives a rational and consistent interpretation to the instrument; and if it be the correct one, it excludes all power on the part of any person after the King's death to alter the substantial effect of what he had done.

Another construction was suggested by Sir Hugh Cairns in his most able argument, who contended, that the word "with" meant "within," and that the intention was to secure the performance of the conditions specified, and other things within the same, i. e. details relating to the conditions already specified.

This construction would practically have the same effect with that which I have pointed out as, in my opinion, the true one, if the language will warrant it; and it is to be observed that it seems to be the meaning adopted by the King's executors, immediately after his death, when in the recital of this passage from his will in the Minute of Council of the 24th February, 1547, the word "within" is used instead of "with."

It seems to me that, upon the will of Henry VIII., if the * case is to depend upon the construction of that instru- * 455 ment, it is reasonably clear that the Dean and Canons, who were themselves objects of the testator's bounty, were intended to take the property to be conveyed to them, and to apply the profits to their own use, performing the duties and making the payments directed by the will.

Then, has any thing since taken place which can destroy that right? I think not. Every thing which afterwards took place was done with the express intent to carry the will into effect.

After the King's death, on the 24th February, 1547, the executors convened the Judges and other lawyers of eminence to consider in what manner the King's will could be best carried into execution.

The indenture of the 4th August, 1st Edward VI. (1547), was executed in pursuance of the advice given at this meeting. It is made between the King (a minor) of the first part, the executors

[illegible]

The [illegible] contained in the deed on the [illegible] part of the Dean and Canons is the main foundation of the argument in support of the information that the Dean and Canons are entitled to so much of the income as was then of the value of [illegible] per annum. By the original deed without reference to the provisions of the deed the Dean and Canons were to be entitled to receive the whole [illegible] a year to such uses and purposes as the King, the Lord Protector, and his executors should be prescribed and appointed in an indenture signed to be [illegible], if they should think fit to prescribe uses and purposes exhausting the whole; so that the King and the executors of the late King might, according to the literal expression of the covenant, validly destroy the foundation of Henry VIII., and deprive not only the Dean and Canons of what they were intended to take, but the Poor Knights also. But I think that upon the context of the deed, the indenture of covenant to be executed must mean such an indenture of covenant as was contemplated by the will of Henry VIII., whatever latitude might be allowed to the King's executors in prescribing additional duties to be performed, or payments to be made by the Dean and Canons, if any latitude at all would be allowed to them, and they were not confined (as I think they were) to auxiliary regulations and ordinances for carrying into effect the charity founded by Henry VIII.

The terms of this covenant, however, are very strong to show that as to the portion of income which might not be exhausted by the trusts of the deed, the Dean and Canons were to be the owners

for their own use. The lands to be conveyed to them were valued at above 812*l.* a year, and to the extent of 212*l.* the Dean and Canons were purchasers by means of the land which they had given in exchange, and the annuity or rent-charge which they had * agreed to pay. No distinction is made between * 457 the lands of which they had become purchasers and the lands subject to the trusts created by the will of Henry VIII. All the lands are conveyed in mass to the use of the Dean and Canons, and the covenant is, that of the whole mass they will employ the rents of so much of the lands as shall be of the yearly value of 600*l.*, or of so much thereof as to the Lord Protector and his co-executors shall be thought meet and convenient, to such purposes as shall be so appointed.

It seems clear, therefore, that the rents of so much of the lands as should not be so withdrawn from the mass were to remain, like the remainder of the mass, the property of the Dean and Canons.

The letters-patent subsequently granted on the 7th October, 1547, are a mere formal completion of the transaction, and do not seem to me to alter the rights of the parties.

Now no deed ever was executed by Edward VI. or the executors of Henry VIII. If they had the power of declaring further trusts, they declared none. The lands remained in the Dean and Canons, subject to the trusts declared by the will of Henry VIII., under which the Poor Knights can claim nothing more than the small pittances (for pittances, in consequence of the change in the value of money, they have become) assigned to them by that will. Unless, therefore, some title can be raised on the part of the Poor Knights, on the ground of what afterwards took place, their case, as it seems to me, must fail.

I cannot help doubting, whether in point of law any thing could be done afterwards to diminish the rights of the Dean and Canons without their consent.

This charity had been, in my view of the case, established by the instruments already stated. The Dean and Canons were vested with the lands, subject to the charges * and * 458 services imposed by the will of Henry VIII.; and I think there was no power on the part of the executors to do more than to issue ordinances and regulations for better carrying the charity into effect. But supposing that a larger power was reserved to the executors, or to Edward VI. and the executors, there seems to be

some difficulty in holding that a personal trust and discretion reserved to particular individuals could be exercised by any other persons, or that the charitable trusts affecting lands which had ceased to be lands of the Crown, and had become the property of an ecclesiastical body, could be altered by a succeeding Sovereign.

If, indeed, the Sovereign without right had attempted to alter the position of these parties, and the Dean and Canons had acquiesced in or submitted to such exercise of authority, they might have been bound to the extent in which they had acquiesced; but as regards the Poor Knights, it is not pretended that any such acquiescence exists, or, indeed, that any alteration has ever been made.

If, in order to affirm the decree, it were necessary to affirm the validity of the ordinances of Elizabeth, I should hesitate to do so. I think there are great difficulties both as to the law and as to the evidence which are necessary to support them. But I think it better to abstain from entering into the question of their validity, because I am satisfied that supposing them to be valid they were not intended to enlarge, and do not enlarge, the benefits given to the Poor Knights. As regards the Poor Knights, their rights and interests are the same, whether they are governed by the will of Henry VIII. or by the ordinances of Elizabeth, or by the usage of three hundred years.

It is very probable that if the founder had foreseen what has since taken place, he would have provided for it, and * 459 * have secured to the Poor Knights a much larger provision than they can at present claim. It is sufficient to say that he has not done so; and that, however the result may be to be regretted, a Court of justice has no power to alter it; and I have come, with some reluctance, to the conclusion that the decree must be affirmed.

My noble and learned friend on the Woolsack, in the opening of his address to your Lordships, made certain observations with respect to the extent to which judicial decisions of your Lordships' House are binding on subsequent cases in the House itself, and and all other English tribunals. Those observations seem to me to open questions of great constitutional importance, the decision of which is not necessary in the present case. I allude to them now only for the purpose of saying that I desire to reserve my opinion upon them, when they arise, entirely unprejudiced by any thing which has passed in this discussion.

Mr. Attorney-General. — To prevent any possible misunderstanding, I may just mention that there is no power, according to the ordinary understanding of the law, to dismiss an appeal in a cause of this kind with costs. Causes of this kind do not come within the recent statute, which is confined only to cases where the property recovered goes to the public revenue.

LORD CHANCELLOR. — We have very deliberately considered that.

Decree affirmed, and appeal dismissed.

Lords' Journals, 23d May, 1860.

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* DONEGALL v. LAYARD. * 460

1860. May 7, 8. June 7.

The Most Hon. the Marquis of DONEGALL, *Appellant.*
HENRY ST. GEORGE LAYARD, *Respondent.*

Renewable Leaseholds. Compensation. Fee-Farm Tenure.

The fifth section of the 12 & 13 Vict. c. 105 (Ir.), is exceptional, and applies to all cases where there is some peculiar and extraordinary value belonging to an estate, which under that Act is converted from a leasehold for lives, renewable for ever, into a fee-farm tenure.

Such a conversion took place. The affidavit in support of the claim for extra compensation stated the opinion of the solicitor, that "but for the passing of the Act, the majority of the tenants of the Donegall estate holding such renewable leaseholds would willingly have paid substantial sums of money as a consideration for fee-farm grants:" that since the passing of the Act the tenants had not been willing to do so; but that some had agreed to pay increased rents, and that in his opinion the difference was "an amount equal to two years' purchase upon the annual value of the premises": —

Held, that this was not sufficient to constitute an exceptional case within the section.

THIS was an appeal against an order of the Court of Chancery in Ireland, and was brought to obtain a decision on the 12 & 13 Vict. c. 105, entitled "An Act for converting the Renewable Leasehold Tenure of Lands in Ireland into a Tenure in Fee."

On the 1st January, 1826, the late Marquis granted to one Richard Harvey a lease of the lands of Carrareagh, in the county of Donegall, for three lives, with a covenant for perpetual renewal at a rent of 40*l.* 7*s.* a year, with farther sums of 10*s.* for every acre that should be grown with corn or other grain over two-thirds of the demised lands, a fine of 1*l.* 6*s.* 8*d.* on the fall of each life, and a farther sum of 4*l.* as a heriot payable on the death of the said Richard Harvey, and every other chief tenant dying in possession of the lands. This lease was renewed in 1841, the lives
* 461 * then put in being those of Prince Albert, Lord John Ludlow Chichester, and Lord Francis Hamilton Chichester.

In 1844, the Marquis died, and was succeeded in his title and estates by the present appellant.

In 1845, a Private Act of Parliament was passed, enabling the appellant, for the purposes therein mentioned, to sell the fee simple of the estates. This Act was amended by another Private Act passed in the following year, which authorised the persons entitled to the rents, &c., of the premises therein mentioned, to grant and convey in fee simple to any person possessed of and willing to surrender the leases thereinafter referred to, all or any parts of the premises as were comprised in any leases for lives perpetually renewable, the grants to be made in consideration of the surrender of such leases and of the payment of such premiums as to the person making the grant should seem reasonable, so that the rent reserved by the grant should not be less than that reserved by the lease, and that the grant should contain powers of distress and entry, &c. In 1849, the general Act, 12 & 13 Vict. c. 105, "The Renewable Leaseholds Conversion Act" was passed. That Act (§ 1) required reversioners, on the demand of the lessees in perpetuity, to execute grants in fee-farm of the lands so leased, declared (§ 2) how the fee-farm rent was to be calculated, and made provision (§§ 3–4) for the commutation of certain exceptional rights.

The 5th section of the statute on which the question arose is in the following terms: —

"Provided also, and be it enacted, that where the estate, into which the reversion, from the owner of which a grant is required as aforesaid, would be converted upon such grant under the provisions hereinbefore contained, would not afford full compensation for the loss of such reversion, or of any power, benefit, or

advantage incident * thereto, or exercised or enjoyed by or * 462
on behalf of the owner thereof, under any local or personal Act of Parliament, charter, settlement, or otherwise, the owner of such reversion may require such loss to be compensated by such an addition in respect thereof to the fee-farm rent to be made payable under such grant, or at the option of the owner of such reversion by the payment of such a gross sum of money as will afford a full compensation for such loss, to be estimated according to the difference in marketable value."

Dr. Layard had become possessed of the lease granted in 1826 to Richard Harvey, and applied to have it converted into a fee-farm grant. This was declined, and in March, 1855, he presented his petition to the Court of Chancery in Ireland, praying that the Marquis might be directed to make the grant in pursuance of the Act. The petition, which was resisted,[1] came on to be

[1] Mr. Torrens, solicitor and land agent to Lord Donegall, made an affidavit in which it was stated that in former cases the Marquis had received compensation for such grants: —

"That this deponent believes and has no doubt that, but for the passing of the Renewable Leaseholds Conversion Act, the majority of the tenants of the Donegall estates holding such renewable freehold interests would have willingly in like manner paid substantial sums of money as a consideration for fee-farm grants, and that a considerable sum of money, amounting to many thousand pounds, might have been realized under the provisions of the said Private Act of the year 1846, applicable to the trusts and purposes thereof.

"That subsequently to the passing of the said Renewable Leaseholds Act, and owing to the doubts thereby created as to the right of the said Marquis to claim compensation under the 5th section of the same, the said tenants on the said estate have been less willing to pay sums of money as fines or increased rents in consideration of such grants.

"That, nevertheless, since the passing of the said last-mentioned Act, in one hundred cases and upwards tenants on the said estate, holding for such freehold interest as aforesaid, have agreed to pay increased rents in consideration of grants in fee-farm of the leasehold premises, such increased rents being calculated, in great majority of such cases, at the rate of four and a half, and in the others at the rate of four per cent., upon a sum equal to two years' purchase of the rents actually payable by them.

"That such increased rents amount in the aggregate to 150*l.* per annum and upwards; that in all such cases the former rents, covenants, and reservations have been retained, the subject-matter of such grants consisting of the bare reversion only, coupled with the fine payable on the dropping of the lives in the said freehold leases.

"That such fines in the said leases consist of sums of 1*l.* 5*s.* or 1*l.* 6*s.* 8*d.*, but not exceeding the last-mentioned sum on the dropping of each life. That the

*463 heard at the * Rolls on the 7th November, 1855, when his Honour was pleased to grant the prayer of it, and by his order to declare "that the respondent, the Marquis of Donegall, is entitled under the 5th section of the said Act to compensation for the loss which will take place in the marketable value of the said respondent's estate and interest in the land and tenements by the conversion of the reversion thereof into a fee-farm rent."

Against this portion of the order Dr. Layard appealed to the Lord Chancellor of Ireland, and the appeal motion having been heard on 2d February, 1856, his Lordship varied the order by omitting therefrom so much as declared that the Marquis of Donegall was entitled to compensation under the 5th section of the Act.

This was an appeal against that decision.

The Attorney-General (Sir R. Bethell) and *Mr. J. H. R. Chichester* for the appellant.—The 5th section of the statute was intended to apply to every case in which there were special circumstances, such as did not occur with regard to every ordinary *464 reversioner. * That was the case with the Marquis, who, under the terms of the Private Acts, was entitled to advantages not enjoyed by other reversioners; of these he was not to be deprived without compensation; the fact that there was in this case a value different from ordinary cases being evident from the nature of the payments to be made under the lease. These were payments, not of rent alone, but of fines for special cultivation, and of heriots. These were shown on affidavit, where it was stated that other tenants had made such compensations; and there was nothing to answer that affidavit. The principle that has been recently applied to compensations granted for special causes under railway statutes ought to be acted upon here. All these things were disregarded in the Court below; yet it is clear from the provisions of the 5th section, that where there can be shown to be a "difference in marketable value" beyond that of the reversion, the owner is entitled to be compensated. In the year 1854, a case occurred in *Ireland* under this statute, and a most elaborate judgment was delivered by the Master of the Rolls.[1] It was

annual rent into which each of such fines would be convertible under the provisions of the Renewable Leaseholds Conversion Act would not in any particular case amount to more than 2*s.* by the year, if so much, except in two or three isolated cases, on the whole estate."

[1] *Ex parte* Knox, 3 Irish Ch. 57.

there said:[1] "If previously to the statute the owner of the reversion had power 'under a local or personal Act of Parliament, charter, settlement, or otherwise,' to convey in fee or in fee-farm, on payment of a sum of money by way of premium or consideration, the conversion of the estate in the reversion into an estate in the fee-farm rent would not afford full compensation for the loss of such reversion, and of the right to contract with the tenant for such fee-farm grant. Lord Donegall had, under the Private Act of 1846, power to convey fee or in fee-farm to tenants holding under leases for life, renewable for ever. There is not, I think, any doubt, under the circumstances I have stated, that * the * 465 5th section was framed to meet Lord Donegall's and similar cases." The Master of the Rolls examined the various clauses of the private acts and of the statute, and also referred, in support of his opinion, to the amendments which had been introduced into them as they went through Committee.

[THE LORD CHANCELLOR. — His Honour ought to have confined himself to what appeared on the statute book.]

That is so; but he said that, even without doing more than referring to the existing sections on the statute book, he had satisfied himself that Lord Donegall's case was intended to be excluded from the statute, and that the 5th section operated in the same manner as to the Irish Society, and so he held that the respondents in that case, the governors of the Irish Society, were entitled to compensation under the 5th section. That case may, therefore, be considered as a decision on Lord Donegall's claim. In another case, that of the *Ex parte The Corporation of Belfast*,[2] an opposite decision was arrived at, but that was merely because there had been no affidavit of the grounds of loss made, and because the attention of the Court had not been drawn to the Private Acts. Those deficiencies have been supplied here; and the Master of the Rolls was clearly of opinion that the provisions of the Private Acts had not been affected by those of the general statute. It is impossible to discuss the reasons on which the Lord Chancellor reversed his Honour's decision, for there was no judgment given beyond this, that the decision was contrary to former ones, and so it was reversed. If the former decisions thus referred to were upon ordinary circumstances, they are of no authority here, for in

[1] Id. p. 85. [2] Cited in *Ex parte* Knox, 3 Irish Ch. 65.

this case there is a Private Act of Parliament, the provisions of which have not been repealed, and which gives the appellant rights beyond those of a mere ordinary owner; and these rights * 466 are * sworn to be of the value of two years' purchase beyond those which are enjoyed under the lease. For the compulsory concession of those rights the appellant must be compensated.

Mr. Isaac Butt (of the Irish bar) for the respondent.—The Private Acts make no difference in this case; it is impossible to discover what additional advantages they give to the appellant. They merely enable him to do, as an individual, what the General Act afterwards enabled and required all owners in fee to do on the demand of tenants holding leases for lives renewable for ever. In all respects, the appellant is now like any other owner. Renewable leases had long been known in Ireland; they were considered equivalent to property in the estate. Their security was shaken by the decision in *Bateman* v. *Murray*, 1777,[1] which was supposed to determine that the right to demand a renewal was irrevocably gone if the demand was not made within six months. But a statute afterwards passed, "The Irish Tenantry Act" (19 & 20 Geo. 3, c. 30), which reassured the minds of men on that point, and such leases have become very usual: Furlong on Leases.[2] Unless there is gross negligence or fraud on the part of the tenant, he is entitled to require a renewal, and equity may interfere on his behalf. But the purpose for which the Statute of Geo. 3 was framed was formerly incapable of being carried into effect without several deeds; now the provisions of the Statute 12 & 13 Vict. render these expensive deeds unnecessary. The possible right of the landlord to exclude the tenant from a renewal, cannot be made a matter of calculation for compensation. The early sections of the statute were intended to secure the landlord compensa- * 467 tion in respect of losses of fines and heriots, * and the 5th section was intended only to secure him in case the preceding sections had failed effectually to do so.

[*The Attorney-General* said that he contended that compensation was secured first where the reversion had a value beyond the rent reserved. Secondly, where there were peculiar profits attached

[1] 1 Ridg. P. C. 187.

[2] Vol. I., p. 261. See Galbraith *v.* Cooper, ante, 315.

to the reversion. Thirdly, where the owner of the reversion stood in some peculiar position with regard to the reversion.]

It is admitted by the respondent, that if the appellant can show, even under his own Acts of Parliament, that he has benefits that no other person can have, he is entitled to compensation; but there is no proof of that in the present case. Even then he must show that no compensation has been secured to him under the other sections of the statute in respect of those benefits. The chance of eviction is not to be treated as one of these. There is no chance of his evicting a corporate body, which, however, is treated, by the Act itself, as a tenant. The Corporation of Belfast held lands under a renewable lease from the appellant, and had them converted into a fee-farm holding, but he was not able, in the case of *Ex parte The Corporation of Belfast* to establish a claim for special compensation against that body.

There have been six cases before the present, all upon this Act, and yet in no one has such a claim as the present been established. The first of these was *Ex parte Somerville*.[1] There additional compensation was refused. The next was a case of the *Belfast Corporation* (which had not been reported) before Lord Chancellor Brady, who likewise rejected a claim of this sort made by the appellant. Then came another case at the suit of this appellant, which was before the Commissioners * in the In- * 468 cumbered Estates Court, *Ex parte Chichester*,[2] where an affidavit was produced similar to that which had been made in the present case, but the Commissioners held that it was not sufficient to found a claim for compensation upon it.

Then came the case of *Knox*;[3] and then it was that the Master of the Rolls went through what had occurred on the passing of this statute, which it is acknowledged he was not entitled to refer to: *Edinburgh Railway Company* v. *Wauchope*.[4] After that came the case of *Re Lawless*, which was heard by the Irish Privy Council.[5] That case was followed by *Thackwell* v. *Jenkins*,[6] before Lord

[1] 2 Irish Jurist, 203.

[2] Wrenfordsley's Renewable Leaseholds Conversion Act. Dublin, 1854.

[3] 3 Irish Ch. 57. [4] 8 Clark & F. 710.

[5] 4 Irish Ch. 230. The Court consisted of Lord Chancellor Brady, Chief Justice Monahan, Mr. Baron Greene, Mr. Justice Keatinge, Right Hon. Francis Blackburne, and Right Hon. Joseph Napier. The marginal note of the case says, "*Ex parte* Knox, 3 Irish Ch. Rep. 57, overruled."

[6] 4 Irish Ch. 243.

Chancellor Brady, who confirmed the decision of the Master of the Rolls, which in that case, as in *Ex parte Knox*, had been adverse to the claim of compensation, and that accounted for the Lord Chancellor saying in the present case nothing more than that after so many decisions the law was too clear to be discussed.

The case of *Knox*,[1] when properly considered, is in favour of the respondent, for there the Master of the Rolls distinctly stated, that but for the Renewable Conversions Act the Irish Society could not convert its leases into fee-farm grants, and that the Act which gave it the power to do this in favour of its tenants, gave it also a title to compensation for exercising that power in their favour; and there too a valuer of estates made an affidavit, "that the * 469 difference of the leasehold interest and the grant * in fee would be two years' purchase" in favour of the tenant, "and would increase the value of the lessee's interest to that extent." Those circumstances do not apply here; the conversion could always have been made, and all that the affidavit here states is, that the tenants would no doubt have paid a considerable sum of money for the conversion of their renewable leases into fee-farm grants, if the statute had not given them power to require that conversion to be made. That certainly is not a ground for compensation which a Court of law can recognise.

The Attorney-General, in reply. — Where a value can be shown which is greater than the market value, compensation must be made. It is so shown here, on the affidavit of a person competent to form an opinion on the subject, and who, besides, states, "in one hundred cases and upwards tenants have agreed to pay increased rents," calculated upon a two years' purchase of the rents. The affidavit here is, therefore, much stronger than in the case of *Knox*. There is no compensation given for the right of sporting, which is always a subject of some and oftentimes of great value. Some of the rights which may be required to be commuted relate to the culture of the land, but the right of sporting is one which the owner is not required to commute. The existence of such a right affects the culture of the land very considerably. It is clear, therefore, that the appellant has special rights under his Private Act in respect of which, when called on

[1] 3 Irish Ch. 57.

under the General Act to surrender them, he is entitled to compensation.

June 7.

THE LORD CHANCELLOR (LORD CAMPBELL).—My Lords, in this case it is admitted that the decree of the Lord Chancellor of Ireland appealed against is right, * unless the 5th section * 470 of the Statute 12 & 13 Vict. c. 105 has a general application to all conversions of leaseholds into fee simple under the statute, or there are peculiar circumstances in this case affecting the compensation to which the appellant is entitled.

I need hardly observe, that we, sitting here judicially, cannot inquire what compensation the appellant ought, in justice and fairness, to have received, when he was to be forcibly deprived of his interest in lands which he and his ancestors had held in fee simple, and his reversion in lands demised by leases containing a covenant for perpetual renewal was to be converted into the right to a fee-farm rent; the fee simple being transferred to the tenant.

According to the affidavit of Mr. Torrens, the interest of the owner in fee simple before the conversion had a selling marketable value exceeding the interest of the tenant for lives renewable for ever, by an amount equal to two years' purchase upon the actual annual value of the premises. And we may regret that the amending Bill, which, according to the statement of the Irish Master of the Rolls, passed the House of Lords, did not likewise pass the House of Commons, as it is said to have enacted, "That in all such cases of conversion under the Act, the difference in marketable value between the reversionary estate to be granted or conveyed, and the value of the fee-farm rent of the same amount as the rent reserved in the lease, should be deemed to be a loss for which the owner of the reversion might require to be compensated."

We, hearing this appeal, can only consider whether, by the decree appealed against, this appellant is deprived of any part of the compensation actually awarded to him by the Legislature. Compensation is freely offered to him for the loss of rent and fine, and every other loss for which compensation is specifically provided, and the question * arises, whether the * 471 5th section is a general guarantee to all landlords who have let their lands on leases perpetually renewable, that the es-

tate into which the reversion is converted shall afford full compensation for the loss of such reversion; so that where no compensation has been allowed for the difference designated by the affidavit of Mr. Torrens, there shall be an inquiry as to the amount of such loss, and this shall be added to the compensation for the losses specifically mentioned in the Act.

We have to say whether the 5th section, as we find it in the statute, is generally applicable to all conversions made under it, or only to exceptional cases, where the reversion is shown to have had some extraordinary value belonging to it. If there had been an intention to give the landlord an additional compensation to the amount of two years' purchase in every case, it seems difficult to discover why this should not have been specifically mentioned, along with a compensation for the rent and fines; or why, instead of enumerating specific heads of compensation, there should not have been a general enactment, that in all cases there should be full compensation according to the difference in marketable value between the reversion and the fee-farm rent. Section 4 is clearly intended for exceptional cases; and section 5 begins exactly in the same words, and by its language is likewise exceptional, for it is only to apply to particular cases, where the estate into which the reversion is to be converted does not afford full compensation for the loss of the reversion. But, according to the affidavit of Mr. Torrens, on which the appellant relies, the estate into which the reversion is to be converted, *minus* the two years' purchase for the difference in marketable value, never can afford the required compensation for the loss of such reversion. To suppose
* 472 the intention of this section, as we now find it on * the statute book, to have been that in every case of conversion, after the compensation has been satisfactorily calculated for the losses specifically enumerated, there shall be a reference, without any special circumstances, to ascertain what farther compensation shall be allowed completely to indemnify the landlord for the loss of his reversion, would evidently be a great obstruction to the operation of the Act, and would lead to the most serious inconvenience.

The authorities against the appellant's construction of the clause, I must say, seem to me altogether overwhelming. We have first two luminous judgments of the Master of the Rolls himself in *Ex parte Somerville* and in *Ex parte The Corporation of Bel-*

fast, when he formed his opinion by carefully examining the Act as it appears in the Parliament Roll, without attending to its history in passing the House of Commons or the House of Lords. Even in *Ex parte Knox*, where, from laboriously investigating that history, I think he came to an erroneous decree, after pointing out how the bill might have been framed so as to do justice to Lord Donegall, he says, "Instead of that course being adopted, a new clause (the present 5th section of the Act) was adopted, which from its terms was, I apprehend, intended to include Lord Donegall's and similar cases, but the language of which appears to be inconsistent with the notion that it was intended as a general and not as an exceptional enactment."

I need hardly observe, that along with the whole profession of the law in Ireland and in England, and with the public at large, I sincerely entertain the highest respect for that distinguished Judge, the present Master of the Rolls in Ireland. But I must lament that his zeal to do justice has led him into inquiries respecting this Act of Parliament which could not legitimately assist him in construing it, and which, I think, unfortunately induced him to change * the sound construction which he had twice be- * 473 fore put upon it. Surely the 5th section ought to receive the same construction, whether it was first introduced into the House of Commons or in the House of Lords, and whether it was introduced in the Committee or on the third reading, and whether it was or was not altered after it was introduced. Nor could the rejection of the clauses moved by Lord Beaumont on behalf of the Marquis of Donegall, in any way affect the construction of the clauses which were allowed to form part of the Act when it became law.

The decision of the Master of the Rolls in *Ex parte Knox* has been overruled by the unanimous judgment of the Commissioners of the Incumbered Estates Court, Mr. Baron Richards, Mr. Longfield, and Mr. Hargreaves, all lawyers of great eminence and peculiarly conversant with Irish tenures and Irish conveyancing.

The same construction was put upon the statute by the unanimous judgment of the Irish Judicial Committee sitting as a Court of Appeal from the Incumbered Estates Court, and I must use the freedom to say that this Judicial Committee, then consisting of Lord Chancellor Brady, Ex-Chancellor Blackburne, Lord Chief Justice

Monahan, and Ex-Chancellor Napier, is as much to be respected as any tribunal in any part of the United Kingdom.

Finally, in *Thackwell* v. *Jenkins*, in which the Master of the Rolls, acting on the opinion he had expressed in *Ex parte Knox*, had directed a similar inquiry to that in the *Marquis of Donegall* v. *Layard*, Lord Chancellor Brady reversed the decree, considering the law upon the subject finally settled.

I entirely concur in these decisions, and I can only consider such an action as the present an attempt to induce Judges to correct an alleged injustice of the Legislature, an attempt which, I * 474 trust, whatever their opinion may be of * the policy or the equity of the enactments they have to construe, they will ever refuse to encourage.

I have only farther to consider whether the appellant makes out a special loss arising from some peculiar circumstances connected with the reversion in this case. But after examining the Private Acts of Parliament relied upon for this purpose, it appears to me that they do not in any manner affect the value of the reversion. They merely remove certain disabilities from the owner of the estates, and seek to give him the same powers usually possessed by an owner in fee simple. The General Act, empowering tenants holding under leases perpetually renewable to obtain the fee simple, very possibly prevented landlords entitled to the reversion in fee from making as good bargains as they otherwise might have made with their tenants who wished for a conveyance in fee subject to a fee-farm rent. But this hardship (if it exists) is imposed upon all landlords entitled to the reversion to be converted, and is no peculiar hardship on a landlord who is, with a limited or restricted estate, empowered by Private Acts of Parliament to deal with the reversion, as if he had in him a pure fee simple.

Upon the whole, my Lords, however much the appellant may be aggrieved by the operation of this Act of Parliament (as to which it would not become me here to say more), I am bound to declare that in my opinion there is no ground for this appeal, and to advise your Lordships that the appeal should be dismissed with costs.

LORD WENSLEYDALE.—My Lords, the question in this case is whether the appellant is entitled to any additional compensation under the 5th section of 12 and 13 Vict. c. 105, either on the

ground that the marketable value of the reversion was proved to be * two years' purchase more than that of the * 475 lease in perpetuity compulsorily granted by virtue of the Act, or on the ground that there was an exceptional value given in this case by a "Private Act of Parliament," viz., that of 18th June, 1846, enlarging the powers of leasing the estates of the Marquis of Donegall.

I am of opinion that the noble appellant is not entitled to any farther compensation on the construction of the Act in question, "The Renewable Leasehold Conversion Act." Whether the noble Lord has been unjustly treated alone, or with others, is no question for your Lordships. We have only to construe the provisions of the Act of Parliament according to established rules, and to give them effect.

I agree entirely with my noble and learned friend on the Woolsack, that unless the appellant could show that there exist some special circumstances, connected with this reversion, creating a loss which does not arise from the conversion of renewable leases in general to leases in perpetuity, he cannot make out his claim to additional compensation. If I had had any doubt upon that point, the long course of decision in the Irish Courts by the Lord Chancellor and other Judges, with the exception of the very learned Master of the Rolls, would have satisfied me that such a doubt ought not to have any weight. That point must be considered as perfectly well settled; and, indeed, if the market value of the reversion, before and after the conversion, were to be the measure of compensation generally, the bad and oppressive and vexatious landlord who insisted upon and enforced all his rights with pertinacity, and whom the lessee would be too glad to get rid of, would be entitled to a larger compensation than the liberal and indulgent owner of the reversion. It is impossible to suppose * that * 476 such could have been the intention of the Legislature.

The appellant, therefore, must show some special reason applying to the reversion of his estate, which would not affect that of others. The statute has provided a special compensation in such cases. Instances were suggested, but by no means instances of ordinary occurrence, in the course of the argument at the bar, of powers, benefits, or advantages, incident to the reversion of particular estates, for which special compensation might be justly

required. The 5th section states that such may arise by a local or personal Act of Parliament as well as by charters, settlement, or otherwise. And it was pressed strongly, that the private Act of Parliament of the 18th of June, 1846, was an Act of that description. The Act gives to the Marquis of Donegall tenant for life, and to those entitled for life, or in tail after his death, under the settlement of 1822, a power to grant and convey, in fee simple, lands contained in any lease or leases for lives, perpetually renewable under a covenant contained in it, paying such sum by way of premium as the person making such grant shall think reasonable and beneficial. I think this Act is not the description of Act referred to in the 5th section; it does not give any special privilege to the owner of the reversion of this estate; it merely puts the tenant for life in the same position as the owner of the reversion in fee, empowering him to make fee-farm grants for ever.

I am of opinion, therefore, that the appellant has no power, benefit, or advantage incident to the reversion of this estate entitling him to the special compensation provided for by the 5th section, according to the true construction of the statute, to which alone we have to attend; and, I am sorry to say, he is without redress.

* 477 * Lord Chelmsford. — My Lords, I had an opportunity of seeing the opinion of my noble and learned friend on the Woolsack before it was delivered, and I agree with it in every respect. I therefore think it unnecessary to say more.

Lord Kingsdown. — My Lords, I also entirely concur.

Order, appealed against, affirmed, and appeal dismissed with costs.

Lords' Journals, 7th June, 1860.

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BRISTOL AND EXETER RAILWAY COMPANY v. GARTON AND STONE.

1860. June 28, 29.

THE DIRECTORS &c. of the BRISTOL and EXETER RAILWAY COMPANY, . . . } *Plaintiffs in Error.*
W. GARTON and M. STONE, ... *Defendants in Error.*[1]

Railway Act. Original Line and Branches. Junction.

AN Act was passed to incorporate a company to make a railway from Bristol to Exeter, and in that Act was a general direction that the charges for conveyance on the railway were to be reasonable. Several other Acts were afterwards passed, authorising the same company to make branch railways, and in one of them, which was passed to amend the previous Acts, and to authorise the construction of a junction line, the 3d section spoke of "the railway" intended to be constructed. The 19th section enacted that it should not be lawful for the company to charge in respect of persons or things "conveyed on the railway any greater sum," and the 20th section spoke of "every passenger travelling on the railway":—

Held, that the words, "the railway," in these sections were not restricted to the junction railway constructed under the authority of that Act, but extended to the whole undertaking, including the original line, the branches, and the junction line.

IN this case a suit had been instituted by the now defendants in error in the Bristol County Court, to recover *a * 478 sum of 5*s.* 2*d.*, alleged to be an overcharge made for the carriage of some goods sent by them on the main line of the company's railway from Bristol to Bridgewater. The suit was removed by *certiorari* into the Court of Exchequer. A case was stated which set forth the various Acts under which the Bristol and Exeter Railway, together with all its branches, had been constructed. Two questions were raised in the Court below, first, whether the words, "the railway," in the 19th section of the 8 and 9 Vict. c. 155, applied to the whole line of railway, or only to the particular junction and branch railway, thereby authorised to be made; and, secondly, whether a certain charge made by the directors was or was not a reasonable charge

[1] Great Western R. Co. v. Sutton, Law Rep. 4 H. L. 235.

under the 178th section of the company's General Act. The Court of Exchequer held that the words did include the whole line of railway, and that the charge was unequal and unreasonable.[1] The case was taken to the Exchequer Chamber, where the judgment was unanimously affirmed.[2] The present proceeding in error was then taken. The decision of this House affected only the first of these questions.

The 6 Wm. IV. c. 36 first incorporated the company, giving it authority to make a railway from Bristol to Exeter. The 178th section authorised the directors so incorporated to provide locomotive engines, &c., to convey upon "the said railway, and also along and upon any other railway communicating therewith, all such passengers, cattle and other animals, goods, wares, and merchandise as shall be offered to them for that purpose, and to make such reasonable charges for such conveyance as they may from time to time determine upon." Several other acts were afterwards passed authorising the making of * 479 branch * railways, and in one of these, 1 Vict. c. 26, § 30, was the expression that the rates, tolls, &c., should be charged after the same rate "throughout the whole of the said railway." That clause was repealed by the 3 Vict. c. 47, and other provisions made. Then came the 8 and 9 Vict. c. 155, intituled "An Act to amend the Acts relating to the Bristol and Exeter Railway, and to authorise the formation of a junction railway and several branch railways connected with the same." Section 3 declared that "whereas the railway is intended to be carried," &c., and section 19 enacted "that it shall not be lawful for the company to charge in respect of the several articles, matters, and things thereinafter mentioned conveyed on the railway any greater sum," &c. The 20th section spoke of "every passenger travelling on the railway." In several of the other sections there was express reference to "the junction railway and the branch railways" thereby authorised to be constructed.

The Judges were summoned, and Lord Chief Baron Pollock, Mr. Justice Wightman, Mr. Justice Crompton, Mr. Baron Bramwell, and Mr. Justice Byles attended.

Mr. G. M. Butt and *Mr. Sergeant Kinglake*, for the plaintiffs in

[1] 4 H. & N. 33. [2] 4 H. & N. 831.

error, contended that the words "the railway," in the 19th section of the 8 & 9 Vict. c. 155, only referred to the branch line of railway authorised by that Act to be made, and therefore could not be applied to restrict charges made in respect of the conveyance of goods along the main line to which that Act could not properly be taken to refer. The words "the railway" in the 20th section must receive the same meaning as the same words in the 3rd section, where it was impossible to doubt that they referred only to the branch line then to be constructed.

* *Mr. Collier* and *Mr. Edling* for the defendants in error * 480 were not called on.

THE LORD CHANCELLOR (LORD CAMPBELL). — My Lords, in this appeal two questions are raised; but if the first question is determined in one way, the second does not arise, and, consequently, in that case we do not require the opinion of the learned Judges upon that. Therefore I think the more convenient course will be that we should ask the opinion of the Judges upon the first question, which is in these words, "Does the 19th section of the 8 & 9 Vict. c. 155 apply to the carriage of goods by the defendants on their railway between Bristol and Exeter?"

This question was agreed to.

The Judges withdrew for a short time, and on their return, —

THE LORD CHIEF BARON said. — My Lords, I am desired by my learned brethren to state to your Lordships that we are unanimously of opinion that the 19th section of the 8 & 9 Vict. c. 155 (local and personal) applies to the carriage of goods by the defendants on their railway, between Bristol and Exeter. The expression "the railway," as used in the 18th, 19th, and 20th sections of that Act, in our judgment, means the whole undertaking, including the original line, the branches, and the junction. We think a comparison of all the clauses plainly leads to that conclusion.

THE LORD CHANCELLOR. — My Lords, I think your Lordships will agree with me in considering it unnecessary to take any farther time to consider * this question. The same * 481 opinion has been given unanimously by all the Judges in the Court of Exchequer Chamber, and now by the Judges who have attended here as the advisers of your Lordships, after hear-

ing a very able argument against the decision of the Court below. Although we certainly are by no means bound by these unanimous opinions, I must say that here I entirely concur in them, and I do not think it necessary to add one single word to what has been said by the learned Judges, but simply to move that the judgment of the Court below be affirmed.

LORD CRANWORTH and LORD CHELMSFORD were of the same opinion.

Judgment affirmed, with costs.

Lords' Journals, 7th June, 1860.

HARRISON *v.* GUEST.

1860. July 6, 9.

WILLIAM and JOHN HARRISON (Paupers), *Appellants.*
EDWARD BIRD GUEST, *Respondent.*

Purchase. Fraud. Deed. Statement of Consideration.

A deed which incorrectly recites the consideration of a contract on which a conveyance was executed, does not thereby warrant a suit to set aside the contract, but only to reform the conveyance.

Where no fiduciary relation exists between two parties dealing for the sale and purchase of an estate, mere inadequacy of consideration or irregularity in the statement of it in the deed of conveyance is not sufficient to impeach the contract.

A. was the possessor of a small property in land. B., a neighboring land-owner, had formerly offered to purchase the property, but his offer had been refused. A. grew old, and became ill; he proposed some arrangement; and the land was conveyed to B. The deed of conveyance truly recited an advance of money to pay off a mortgage on the land, and then it recited other
* 482 money considerations. * Instead of these money considerations, the real agreement was that B. should allow A. to live in a certain cottage, occupied by one of B.'s tenants, providing him there a bedroom and sitting-room and attendance, and supplying him with food from B.'s table. This deed was prepared by B.'s solicitor; it was sworn in evidence that A. had refused to have another solicitor called in, and that the statements of the latter class of money considerations in the deed were only made as a security to A. in case

the board and lodging, &c., should not be properly provided. In a suit by persons whom many years before he had made his devisees to set aside this deed of conveyance: —

Held, that there being no actual fraud proved (though it was charged), the irregularities in the statements contained in the deed were not sufficient to make a Court of equity set aside the transaction.

Observations on the framing of deeds in such cases.

JOHN HUNT, a man in a humble situation, and without education, was the owner of a small copyhold property, situated at Broadwas, in the county of Worcester, consisting of thirteen acres of land, and having a small house, stable, and shed erected thereon. It had been mortgaged in 1819, to secure to Mary Ann, the wife of S. B. Butler, the repayment of a principal sum of 300*l.*, with interest at five per cent. per annum. In 1828, he made a will, devising the property to the two appellants. Up to September, 1849, Hunt had lived in the house and farmed the land, but illness having then rendered him incapable of continuing to labour, he let the house and land at the rent of 35*l.* a year to one Harper, with whom he then became a lodger. In the course of 1853, being then seventy-one years of age, and finding himself getting worse, and requiring more attention than he could receive from his tenant, he made an offer first to a Mr. Evans, and afterwards to the respondent, a man of fortune in that parish and neighbourhood, respecting the property. The offer, in substance, was, that Hunt should be installed as an inmate in * the Yew-Tree * 483 farmhouse, occupied by Ballard, a tenant of Guest's, and should have his lodging, washing, and attendance there, and should have his dinners from Mr. Guest's table. Some years before that time the respondent had offered to purchase this property from Hunt; but Hunt, who was then working it, declined to sell, and no farther negotiations took place between them till this offer in July, 1853.

The appellants in their bill alleged, in substance, that the respondent urged Hunt to go and live at the house of one Ballard, a tenant of the respondent, and promised to support Hunt there, to pay off the mortgage debt, and take the security of the copyhold estate for that debt and for what should be advanced for the maintenance of Hunt; that Hunt consented to this arrangement, and was on the 30th September removed to Ballard's house; that on the same day the mortgage debt of 300*l.* (together with 6*l.* 5*s.* for

interest then due, and 7*l.* 10*s.* for six months' interest in advance) was paid off; that on the 6th October following the mortgagees were called on to execute, and did execute, as parties with Hunt, the deed by which the property was conveyed to the respondent. That deed recited the payment of 313*l.* 15*s.* to the mortgagees, and that Hunt had contracted to assign the property to the respondent upon such payment, and upon his entering into the covenants thereinafter contained, "for the lodging, maintenance, and support of the said John Hunt during his life." It then alleged the assignment by the mortgagees, and witnessed that, in consideration of the payment of the farther sum of 10*l.* by Guest to Hunt, and of the covenants to be performed by Guest, Hunt assigned to Guest. It then set forth the covenants in these terms, that "he, Guest, shall and will henceforth from time to time, and at all times during the continuance of the natural life of the said John *484 *Hunt, provide the said John Hunt with good, sufficient, and suitable meat, drink, board, and lodging, and the washing of his clothes, and bedding, and attendance. And, moreover, that in case the said E. B. Guest shall at any time hereafter neglect or refuse to provide the said John Hunt with sufficient and suitable meat, drink, board, lodging, washing, and attendance, then and in such case the said E. B. Guest shall and will pay or allow unto the said John Hunt the sum of 12*s.* per week in lieu of providing him the said John Hunt with meat, drink, board, lodging, washing, and attendance as aforesaid." There was then a proviso that Guest was not bound to supply Hunt with "medicine or any other extra attendance in the case of sickness, or with wine or spirits," nor to be "liable for funeral expenses." The bill alleged that in these transactions Hunt was entirely without professional advice; that the deed was not read over or explained to him, and that he was charged 9*l.* 18*s.* 4*d.* for costs, as if he had been a mortgagor and not a vendor, and that the business was hurried over with extraordinary haste, and no abstract of title prepared as was usual in the purchase of landed property, but that Guest, in his eagerness to get possession of the title-deeds, never inspected them, but paid off the mortgage at once. The bill also alleged that, at the time of executing the indentures, Hunt did not know nor understand that he was selling the estate; that the defendant asserted that he was to give 600*l.* as the consideration he estate, 100*l.* of which (after payment of the mortgage)

were to be paid to Hunt in money, and the surplus retained to answer the covenant as to board and lodging; but that the 100*l.* never were paid to Hunt, and that he never received any other consideration for the indenture than maintenance and lodging for a few weeks, and that the property, at the date of the indenture, was of the full * value of 700*l.* The bill, after *485 alleging that the defendant had taken possession of certain personal property of Hunt, prayed that the indenture of the 6th October, 1853, might be declared null and void, or only stand as a security for the advances made by Guest to Hunt, and that accounts might be directed, and for farther relief.

The defendant, by his answer, as to the imputed haste, said, that Hunt pressed for the immediate execution of the arrangement, as he was very uncomfortable where he then was; that the defendant's own offer had been to purchase the estate out and out; that that was refused by Hunt, who was urgent about his own personal comforts being provided for, and who insisted upon the arrangement as to board and lodging, &c. The defendant admitted that Hunt was without professional advice, but alleged that he had been recommended to have a solicitor of his own, which he declined. The defendant denied all fraud, or that he himself had hurried or pressed on the arrangement; he denied that he had ever said that Hunt was to have 100*l.* in money, or that Hunt had been charged with any thing but what was usually paid by vendors, and he declared that Hunt well knew he was parting with the estate. He alleged, as the fact, that he was "to give 600*l.* as the consideration for the estate; and that after paying off the 300*l.* mortgage, the surplus of the said sum of 600*l.* was to be retained by me to answer the covenant in the bill mentioned;" and he alleged that the said John Hunt, up to the time of his death, was fully lodged and maintained according to the terms of the arrangement. Evidence was taken in the cause, and there was a great deal of conflicting testimony as to the state of Hunt's mental faculties. The cause was heard before Vice-Chancellor Kindersley, who pronounced a decree declaring the indenture of the 6th October fraudulent and void as an absolute conveyance, * but directed it to stand as a security for the amount ad- *486 vanced by the defendant in satisfaction of the mortgage, with interest; and accounts were directed. The case was taken, by appeal, before the Lord Chancellor, Lord Cranworth, who, in

May, 1855, reversed the decree of the Vice-Chancellor, expressing his opinion "that there was no fiduciary character whatever existing between the vendor and the purchaser."[1] This appeal was then brought.

Mr. Shapter and *Mr. Hindmarch* (*Mr. Swanston, jun.*, with them) for the appellants.[2] — This case is one in which equity will interfere to set aside a bargain obtained by undue influence. It is not necessary that for such a purpose there should have been actual fraud, though, if it was so, there are circumstances in this case which certainly bear that character. Thus, for instance, the allegation in the deed of the payment of 10*l.* is altogether a fiction. It is so alleged in the bill; it is so admitted in the answer. Hunt, no doubt, wanted to provide for his own comfort, but not by the sale of his estate; he had more than once refused to part with it. What he desired was, that it should stand as a security for the payment of the money required to secure him the comforts he sought in his declining life. Hunt had no solicitor. Corles, who was a solicitor, and had acted in that capacity for Guest, was introduced by Guest to Hunt. Corles had sworn that he read over and explained the deed to Hunt; but when his affidavit came to be examined, it appeared that he had only occupied him-
* 487 self from twenty * minutes to half an hour in this labour. The mere reading of the deed would fully have occupied that time and left not a moment for explanation; and this deed too was one of a complicated nature, that even a lawyer would not have understood on merely once hearing it read, or even once reading it. Again, there was a charge which the defendant had taken on himself, of money found in Hunt's possession, and this was attempted to be discharged by a pretended payment made after Hunt's death, and that receipt was ante-dated, so as to make up the account as of things paid in Hunt's lifetime. These things show, beyond doubt, that the two parties were dealing on unequal terms with each other.

The rules applicable to a case of this kind are clear. The purchaser of a reversion, for instance, must show that he gave full

[1] 6 De G., M. & G. 424, 438.

[2] There was a question of fact raised on the evidence, whether Hunt was in full possession of his mental faculties, as to which their Lordships expressed a clear opinion that he was.

value for it; *Wood* v. *Abrey*;[1] and it was there especially put forward as a ground of objection to the bargain that the parties had not been dealing on equal terms. The onus of showing that the dealing was fair is on the person sustaining the transaction; *Maitland* v. *Irving*,[2] *Archer* v. *Hudson*.[3] These were cases of strangers. There is no rule declaring that, except where fiduciary relations exist between the parties, equity will not interfere to question the transaction. In *Billage* v. *Southee*,[4] Vice-Chancellor Wigram said: "The jurisdiction is founded on the principle of correcting abuses of confidence; and I shall have no hesitation in saying it ought to be applied, whatever may be the nature of the confidence reposed, or the relation of the parties between whom it has subsisted;" and he applied that principle to restrain the circulation of a promissory note obtained by a medical man from his patient; and in *Salter* v. *Bradshaw*,[5] * the * 488 Master of the Rolls carried the principle to the extent of setting aside the purchase of a reversion forty years after the purchase was effected, and one year after the vendor had come into possession, upon evidence that full value had not been given for it.

[THE LORD CHANCELLOR. — But this is not the case of the purchase of a reversion.]

The principle applicable here is the same.

The statements in the instrument of transfer were untrue, and where that is the case, the party claiming a benefit under such an instrument has been held bound to show that the circumstances were in fact fair; *Watt* v. *Grove*,[6] *Bowen* v. *Kirwan*;[7] and in *Ahearne* v. *Hogan*[8] it was declared that there must be a clear statement of the transaction on the face of the deed itself; *Gibson* v. *Russell*[9] is to the same effect.

[THE LORD CHANCELLOR. — Did these cases decide that if two competent parties concur in stating a consideration untruly, the deed is to be set aside?]

Not quite so; but that is to be taken into consideration in estimating the fairness of the transaction. In *Lawley* v. *Hooper*[10] there was on the final execution of the deed a variation of the

[1] 3 Mad. 417.
[2] 15 Sim. 437.
[3] 7 Beav. 551.
[4] 9 Hare, 534, 540.
[5] 26 Beav. 161.
[6] 2 Sch. & L. 492, 502.
[7] 1 Lloyd & G. *temp.* Sugd. 47.
[8] Drury, 310, 326.
[9] 2 Younge & C. Ch. 104.
[10] 3 Atk. 278, 281.

original terms, and Lord Hardwicke would not allow that to be acted on, saying that it was inequitable, and "infected the whole case;" and in *Evans* v. *Llewellyn*,[1] a conveyance obtained from persons uninformed as to their rights was set aside, though there was no actual fraud or imposition. *Wilde* v *Gibson*[2] does
* 489 not apply to this case, for there the fraud was imputed * to the principal, whereas, in fact, if there had been any, which did not at all appear, it was that of the agent.

[LORD CRANWORTH.—If fraud is alleged, you must distinctly make it out.]

If fraud is alleged, though not completely proved, but where circumstances of unfairness are shown, equity is not restrained by the mere formal allegation of fraud, but will give the proper relief; *Archbold* v. *The Commissioners of Charitable Bequests in Ireland*.[3] In *Espey* v. *Lake*,[4] a young lady, only then in her twenty-second year, signed a promissory note as surety for her step-father, in whose house she was then living; the Court restrained the payee from putting in execution a judgment obtained upon it. And in so doing declared that it would not refuse that equitable relief merely because the plaintiff had superadded to the circumstances which would entitle him to relief, a charge of fraud which was not established. *Baker* v. *Bradley*[5] shows that the bill need not to be rested on fraud alone, and *Billage* v. *Southee*[6] and *Hunter* v. *Atkins*[7] show that the failure in the charge of fraud will not affect the right to relief on the other equities; and in *Willis* v. *Childe*,[8] where there was a complaint of the corrupt exercise of a trust power, though the Vice-Chancellor thought that the charge of corruption had wholly failed, he gave relief on the ground that the power had been unduly exercised.

Mr. Bailey and *Mr. Glasse* (*Mr. Elderton* was with them) for the respondent.—The contract and the instrument to carry it into effect must alone be considered. The statement as to the
* 490 money * consideration is wholly immaterial. It became so when the purchase of the estate was not to be effected by

[1] 1 Cox, 333, 2 Brown, Ch. 150.
[2] 1 H. L. Cas. 605.
[3] 2 H. L. Cas. 440. See Curson v. Belworthy, 3 H. L. Cas. 742.
[4] 10 Hare, 260.
[5] 7 De G., M. & G. 597, 627.
[6] 9 Hare, 534.
[7] 3 Mylne & K. 113.
[8] 13 Beav. 117.

money, but by supplying Hunt with the comforts of life. If the statement in the deed is wrong, that might be a ground to rectify it, but not to set aside the contract, for Hunt had the benefit of the real consideration for the purchase; he had the comforts of life supplied to him in the way he desired. There was no inadequacy of consideration here in the making of the contract, though by the death of Hunt at a period earlier than was anticipated, the bargain became profitable for the respondent.

For the purpose of maintaining such a suit as this there must be a fiduciary confidence. There was none here.

As to the cases, *Watt* v. *Grove*[1] was an instance of abuse of the fiduciary character. Leases and agreements for leases were obtained by an agent from his principal, who reposed confidence in him; the agent abused that confidence for his own advantage. An impeached deed cannot of course be supported by considerations wholly different from those which were stated in it; but that was not the case here, the money payments being only stated as measurements of the comforts which were to be supplied to Hunt, and which were supplied to him. *Evans* v. *Llewellyn*[2] was a case where a great superiority had been obtained by one party coming on the other by surprise, and taking advantage of his pressing necessities. There had been in that case no previous negotiations, but the whole thing was hurried on, and no time allowed for advice or explanation. There was no fraud here. The evidence showed that Hunt knew how to make a bargain; he secured what he desired; the conditions on which the property was sold were duly performed; he never complained, but * was always * 491 satisfied; he is now dead, and the Court is called on to interfere for persons who had no direct interest, and whom he never thought of when he was considering his own comforts.

Mr. Shapter replied.

THE LORD CHANCELLOR (LORD CAMPBELL.) — My Lords, this case has been argued very zealously and very ably; but having listened to that argument, I am clearly of opinion that your Lordships ought to affirm the judgment of the Court below. The bill is filed for the purpose of setting aside a conveyance, on the ground of fraud on the part of Mr. Guest. It is alleged that he induced Mr.

[1] 2 Sch. & L. 492. [2] 1 Cox, 333, 2 Brown, Ch. 150.

Hunt, the owner of the property to which the conveyance relates, to believe that the property was merely to be mortgaged as a security for money that was to be laid out by Mr. Guest in repayment of a mortgage then existing upon the property, and in providing for Hunt for the rest of his life; so that Hunt was cheated out of his estate by being induced to sign an absolute conveyance of it. Now, that is not in the slightest degree proved, nor do I find any ground for imputing any fraud of any sort to Mr. Guest.

I think that the conveyance was improperly framed, and I censure that. Mr. Guest is punished by this suit for having resorted to that artifice, because it is quite clear that he wished that the conveyance should not disclose the real transaction; he thought that it would have a better appearance when the title came afterwards to be examined if this pecuniary consideration appeared. But setting that aside, which I must condemn, I see nothing in his conduct in the slightest degree to be blamed.

The offer came in the first instance from Hunt to him. *492 *Instead of its being snapped at by Mr. Guest, he goes to Scarborough and tells Hunt that he had better take time to consider it. It was finally agreed between them, and I think quite deliberately; it was what Hunt was determined upon; he would not sell this property, but he wished to enter into an engagement whereby, during his life, he should be sure of a comfortable maintenance. He first of all enters into negotiation with Evans for that purpose; that goes off, and then he comes and asks Mr. Guest, who seven years before had expressed a wish to get possession of this property, and this bargain was entered into, Hunt being at the time, according to the evidence, perfectly unimpaired in his faculties. It is quite clear that there was a bargain. Hunt over and over again stated to various people what the bargain was; that in consideration of the conveyance of this copyhold land to Mr. Guest he was to have a parlour in the Yew-Tree Farm, and to be fed from the table of Mr. Guest, and that bargain being so entered into, it was carried into effect; he was transferred to Yew-Tree Farm, and he was fed in a manner entirely to his satisfaction.

Then, that being so, if the conveyance had truly stated what had taken place, there would not have been the smallest colour for setting it aside; but, as it stands, it represents the transaction in a manner very much to be lamented, and to those who did not

know what the real transaction was, it was an excuse for an attempt to set aside the conveyance, although I cannot help wondering that this specific charge of fraud should have been made, of which there is not the slightest evidence, and that, after the answer had been given in, it should still have been persevered in. If this was the genuine, *bonâ fide* bargain entered into between Hunt and Guest, any difference in * the statement of the transaction * 493 as to the nature of the agreement would not be a ground for setting aside the conveyance, though it would be a ground for a bill to reform it. But this is not a bill to reform it; this is a bill to set it aside, and it seems to me that there is no sufficient ground for setting it aside. I must, therefore, advise your Lordships to dismiss this appeal, and affirm the decree.

LORD BROUGHAM. — My Lords, I entirely agree with my noble and learned friend in his view of the case in all its parts; and I should not say one word, except to express my very great approbation of the zeal with which this poor man's cause has been supported at your Lordships' bar; and I state this only to express my opinion, from long experience, unvarying in that respect, that this is not an exception that Mr. Shapter has made to the ordinary course of our profession, but that he has followed the constant course of the profession in dealing with all such pauper cases.

LORD WENSLEYDALE. — My Lords, I entirely agree with the opinion of my noble and learned friend on the Woolsack; I concur entirely in all the observations that he has made upon this case; I do not feel the least doubt about it. There is no case of fraud made out, nor is there any fiduciary relation established between Mr. Guest and Hunt, so as to entitle Hunt to particular care and attention. He was a man perfectly free to enter into the contract, perfectly in possession of his faculties, according to the weight of evidence, and he was dealt with perfectly fairly upon the occasion. The error which has been alluded to in the * mode * 494 of framing the conveyance, I think, is not to be attributed to fraud, though it would have been a good ground for reforming the deed if that had been sought by the bill.

LORD CRANWORTH. — My Lords, I will only say that I see no reason whatever to depart from the observations that I made when

the case was before me in the Court of Chancery. The only observation I would now add is this, that I think this case may afford a useful warning to persons in framing deeds, because it strikes me, as it did when the case first came before me, that if the exact truth had been told, nobody would have dreamed of there being fraud in the case. It is only because the parties (whether it was Mr. Guest or Mr. Corles, I know not, but the parties between them) thought to make the matter clear, or to clench it by stating something that is untrue, that all this unfortunate litigation has arisen.

THE LORD CHANCELLOR. — The appellants being paupers, we can say nothing about costs.

Decree affirmed, and appeal dismissed.

Lords' Journals, 9th July, 1860.

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*495 *BAKER *v.* LEE AND OTHERS.

1860. May 15, 21; July 19.

THOMAS BAKER, *Appellant.*
JOHN LEE and others, *Respondents.*

Charity. "Godly Learning." Dissenter. Trustee. Costs.

A school was founded in the reign of Edward VI. at Ilminster, and the trust declared was, first, for the teaching of "Literature and Godly learning," and as it was elsewhere expressed, "Godly learning and knowledge." The deed then went on to direct that if, upon taking the accounts in October of each year, there should be, after providing for this purpose, any surplus, then, the trust, secondly, was for the mending and repairing the highways, bridges, and watercourses of the parish. When the trustees were reduced to four, they were to make up the number to twenty, by appointing "other honest persons of the said parish of Ilminster." For a period of one hundred and fifty-six years, dissenters had been admitted with churchmen to the management of the trust. The Master of the Rolls held that dissenters, as such, were not excluded from being appointed trustees. The Lords Justices reversed that decision, and declared that dissenters ought not to be appointed. On appeal, the Lords being equally divided, the order of the Lords Justices was affirmed.

The costs of the appeal were ordered to come out of the fund.

In 1549 two persons, named Humphrey Walrond and Henry Grenfylde, were the holders of certain long terms of years, originally created by the Abbot and Convent of Machelney, in certain lands at Ilminster, in the county of Somerset.

On the 18th May, 1549, an indenture was executed between Walrond and Grenfylde of the one part, and John Balche and several other persons on the other part, by which it was recited, that the said parties of the first part, "tendering the virtuous education of youth in literature and godly learning, whereby the same youth so brought up should the better know their duty to God as to the King's Majesty, and for divers other godly and honest reasons them specially moving, assigned all their estate, * interest, and term of years" unto Balche and the others, * 496 to the following uses: First, that Balche and the others shall, at the feast of St. Michael, "by their discretion, or by the discretion of the more part of them, provide and get one honest and discreet person, of good behaviour, name, fame, conversation, and condition, to be a schoolmaster who shall freely instruct, teach, induce, and bring up, as well in all godly learning and knowledge as in other manner of learning, all such children and youth as shall be brought to him, to the same intent and purpose, according to the tender wit and capacities of such youth and young children, as the same schoolmaster from time to time shall think meet and convenient, and to provide the schoolmaster a house, and, if need be, to put him away, and appoint another;" and on the first Sunday in October of each year the majority shall appoint a bailiff to receive the rents, &c.; and with the issues, &c., shall repair the houses on the premises, to pay the salary to the schoolmaster, and to the landlord the rent reserved on the leases, and take the accounts, and put by the money "to be bestowed for the discharge of the King's silver, and for the mending and repairing the highways, bridges, watercourses, and conduits of water, wherewith the inhabitants of the said parish of Ilminster are or shall be charged or chargeable, as far as the said sums of money will extend to." And if the grantees should die, "so that there remain but four of them on life, then that the said four persons then being on life, shall give, grant, and set over their right, title, and term of years then enduring, to as many other honest persons of the said parish of Ilminster, to the number of twenty, as shall be by the said grantees then on living

thought most convenient to the uses, intents, and purposes afore rehearsed." These original terms of years expired, but in *497 the meantime the different trustees had, *after providing for the school, highways, &c., with the funds purchased other property, which, by deeds, dated in 1607, 1610, 1653, 1666, 1681, and 1695, were conveyed in the same terms to certain persons of the parish of Ilminster, for the purposes of the trust.

A school had been maintained at Ilminster ever since the foundation. In the management of the school, no exclusion on account of religious opinions on the part of the pupils or their parents had been directly imposed. Writing was taught from the year 1577, and all other teaching usual in English education for the poor and middle classes. Branch schools, consisting of commercial and dame schools, had been maintained by the trustees, and the original and auxiliary schools had been open to children of all religious denominations. No religious test had been applied to the teachers. The highways, &c., had been repaired out of the charity funds, so that for upwards of thirty years no highway-rate had been made in the town. The new trustees had never been selected exclusively from the members of the Church of England, or from any particular religious denomination, and there was evidence that, for the last one hundred and fifty years, there had always been dissenters among the trustees.

In the year 1857 the number of the trustees was reduced to seven. Instead of waiting till there were only four trustees, when a new appointment could have been made by the sole authority of these four so remaining, an application was made to Chancery to sanction the appointment of new trustees. Before the order was made, two other trustees died. The names of fifteen inhabitants of Ilminster, all Protestants, and all very respectable men, were proposed, but an objection was made to three of them, as being dissenters. The Master of the Rolls overruled the objection, and declared "that persons dissenting from the doctrines of the *498 Church of England are eligible to be appointed *trustees of the charity." An appeal was brought against his Honour's order, and on the 25th May, 1858, the Lords Justices directed that it should be varied, by omitting these words, and, it appearing that three of the persons named to succeed as trustees were not members of the Church of England, it was directed "that the order be farther varied, by omitting their names." And it was

ordered that "three new trustees of the said charity, being members of the Church of England, be appointed.[1]"

The present appeal was then brought.

Mr. Baker, for the appellant. — The words "godly learning" imply nothing that can exclude dissenters from taking part in the management of this school. In *Attorney-General* v. *Hartley*,[2] Lord Eldon held that the words "pious and godly" had not any particular reference to religion, but that the uses must be such as were pious and godly within the meaning of the instrument. That rule of construction, applied here, will exclude any restriction of the choice of masters to the members of a particular creed; and these general words were no doubt used to shut out the possibility of such a question as is now raised. Luther employed those words in a universal sense in 1527, and the probability is, that those who founded this school were Bible-meeting people, and used the words in the same unrestricted sense. In Crosley's History of the English Baptists, it is said there is no danger to the godly except from wealth, which brings danger to all; in which phrase certainly there is no restriction as to sect. So far, therefore, as can be judged from the use of these words, about the time of the foundation of this school, all pious persons were included within * them. The law knows no distinction between church- * 499 men and dissenters. All parishioners have a right to seats in the church, all may be buried in the churchyard, and all may be compelled to be churchwardens; nor is there any rule of law which supplies a test to distinguish them. The Court of Chancery cannot be bound by supposed rules, which are contrary to the spirit of the Legislature. It was not so bound in *The Attorney-General* v. *The Bishop of Worcester*,[3] where the school was for the benefit of the inhabitants generally, and though the masters were required to be churchmen, the scheme was reformed so as to admit the children of dissenters. Rugby School and many others have been the subject of Acts of Parliament. The Rugby Act, 54 Geo. 3, c. 131, does not mention any particular religious persuasion, but, like this deed, speaks of "honest persons in the parish of Rugby." The Mercer's Company in like manner does not exclude dissenters from its trusts. The deed of the Free

[1] Re Ilminster School, 2 De G. & J. 544.
[2] Jac. & W. 353.
[3] 9 Hare, 328.

trustees, even though there is a subsidiary purpose, such as exists here, in the trust. If any dissenters were admitted, all could be. If a Unitarian dissenter can be admitted under these general words, so can a Roman Catholic. The expression "godly learning" clearly means that which was then taught in the Established Church. The case of *The King* v. *The Archbishop of York*[1] illustrates this point. There the opinion of Lord Keeper Wright (founded on a case in the Year Book, 11 Hen. 4, p. 47), uttered in *Cox's Case*,[2] "That the keeping of schools is, by the old laws of England, of ecclesiastical cognizance," is expressly adopted by Lord Kenyon, and a return to a mandamus, to the effect that the person applying for it would not submit himself to be examined as to his sufficiency in learning, that is, in church learning, was held to be good. So, in *Caudrey's Case*,[3] those who would not attend the service of the Church of England were treated as persons not to be entrusted with a power, a view of the matter which had been previously adopted by the 2 & 3 Edw. 6, by which not any performance of religious worship was allowed, except in accordance with the prayer-book. The 1 Eliz., c. 2, § 14, confirmed the previous Act of Edward VI., c. 1, for uniformity. In 1558, there was a canon to the same effect. The 23 Eliz., c. 1, in which there was a penalty on any one keeping a schoolmaster who did not attend church, and the 1 Jac. 1., c. 4, followed up the same principle of legislation. The 13 & 14 Car. 2. c. 4, restricted persons from teaching as schoolmasters without a license from the Ordinary, and in Anne's reign there was strong legislation
* 503 against any school which was not of the Established *Church. So that it is perfectly plain that education would not then have been given in any form except that of the Church established by the State; that, however, was perfectly compatible with the admission into the school of the children of dissenters. The *Chelmsford Grammar School Case*,[4] *The Attorney-General* v. *Mansfield*,[5] and *The Attorney-General* v. *Christ Church*,[6] sustain the same doctrine.

It is of no importance that this was not a grammar school in the strict sense of that expression; it was a school for the teaching of

[1] 6 T. R. 490.
[2] 1 P. Wms. 32.
[3] 5 Rep. 1, *a*.
[4] 1 Kay & J. 543.
[5] 2 Russ. 526.
[6] Jac. 474.

"godly learning," which at that time meant religious instruction, according to the doctrines of the Church of England.

Contemporaneous usage cannot be set up here, for that which is now spoken of as such did not begin till long after the Revolution and the passing of the Toleration Act. The *Norwich Charities Case*[1] shows that dissenters can only be properly admitted to be trustees where there is no religious teaching of the kind directed here. They were admitted there because the foundation was for industrial schools alone.

In this case the Master of the Rolls admitted that all the trustees must be members of the Church of England, if the trust was confined to the purpose of the school. That admission surrenders the whole case, and his judgment in the *Stafford Charities Case*[2] is still more strong to the same effect. *The Attorney-General* v. *Calvert*[3] is not in point here, for the charitable object there was sustenance of the decayed poor; but even that case required a conformity to forms, the non-observance of which would have been a bar to the claim for participation in the benefits of * the charity. The intention of the founder, which must, * 504 if not unlawful, govern every thing, is here clearly expressed; mere usage, which may have been the result of negligence, cannot overrule it.

Mr. Baker, in reply. — Not for one only, but for all the purposes of this charitable trust, dissenters are eligible. In point of law, dissenters are, if not excommunicated, members of the Church of England, and the law does not take notice of them as distinct from churchmen, and therefore the distinction now insisted on cannot be enforced, nor these persons, admitted to be eligible in all other respects, excluded.

July 19.

THE LORD CHANCELLOR. — My Lords, in this case I do not think that there is any weight in the arguments chiefly relied upon by the learned counsel for the appellant, in contending for a reversal of the order of the Lords Justices appealed against.

I am clearly of opinion, that the school in question ought to be considered a Church of England school, although it was founded in March, 1548, after the repeal by 1 Edw. 6 c. 12, of the six

[1] 2 Mylne & C. 275. [2] 25 Beav. 28. [3] 23 Beav. 248.

Acts, and the other laws of Henry VIII., making any differences from his dogmas in religion capital offences, and before the passing of the 2 & 3 Edw. 6, c. 1, "for uniformity of service, and administration of sacraments throughout the realm." At the foundation of this school, the Church of England was in existence as a Protestant Church, and its identity from that time to the present cannot be questioned, whatever changes may have since been made in its discipline by the united action of Parliament and convocation.

It seems quite clear to me that religion was to be taught in this school, and that this was to be the protestant religion *505 *as then established. By the deed of settlement, the trustees are required "to provide and get one honest and discreet person, and of good behaviour, name, fame, conversation, and condition, to be a schoolmaster, which shall freely instruct, teach, induce, and bring up, as well in all godly learning and knowledge as in other manner of learning, all such children and youth as shall be brought to him to the same intent and purpose." A power is then conferred on the trustees to remove the schoolmaster, giving him a quarter's warning, and to elect another in his stead "to do as the other schoolmaster should do." There was only to be one schoolmaster, who was to instruct all the children in all godly learning and knowledge. There can be no doubt that religion was to be taught in this school; and what other religion could have been intended, except the religion of the Church of England?

Mr. Baker's next position was that Courts of Justice cannot recognise any distinction between members of the Church of England and dissenters, and that all the inhabitants of the parish are to be deemed members of the Church of England. *Primâ facie*, they have all a right to "seat and sepulture" in the church and churchyard, but nonconformists, as a class having serious disabilities and some privileges, have long been recognised in Acts of Parliament and in judicial proceedings. The distinction is reasoned upon by both sides in this suit, and the three gentlemen whose appointment as trustees of the charity is in controversy are admitted not to be members of the Church of England.

Nor can I agree with Mr. Baker, that assuming this to be a Church of England school, and that a distinction may be made in the appointment of trustees between inhabitants of the parish who

are members of the Church of England and others who are not, still that there would be * no objection to all the twenty * 506 trustees being dissenters or Roman Catholics. The school being an essential part of the charity, I think there should be such a choice of trustees as to create a reasonable certainty that the tenets of the Church of England shall be taught in the school; and this object, I think, can only be attained by a considerable majority of the trustees who are to choose, superintend, and dismiss the schoolmaster, being members of the Church of England.

Finally, I must protest against Mr. Baker's oft-repeated sayings that to hold that dissenters ought not to be appointed trustees of a Church of England school is casting a stigma on the whole body of dissenters. Suppose that there were (as there may now be) a school endowed in England, the deed of foundation requiring that the religious tenets of the Unitarians shall be taught in the school, surely there would be no stigma cast upon those who approve of the whole Athanasian creed, if it were held that they ought not to be appointed the trustees of such a school.

Nevertheless, when I look to the nature and history of this Ilminster charity, I am of opinion that the Lords Justices were not right when they reversed the order of the Master of the Rolls, allowing John Rutter, Thomas Lang and Malachi Blake Collins, recommended along with twelve others by the existing trustees, to be appointed trustees of the charity, the sole ground of the decision of the Lords Justices being that these three gentlemen are not members of the Church of England, although the existing trustees who recommended them, and the Master of the Rolls who appointed them, thought that they were the fittest persons to be appointed. If the circumstance of not being a member of the Church of England is of itself an absolute disqualification for being a trustee of this charity, insomuch * that a person * 507 who, when appointed, was not a member of the Church of England, or a person who since his appointment has ceased to be so, ought to be removed from the trusteeship, then (but in my opinion not otherwise) the order of the Master of the Rolls was properly reversed.

In considering the question, we must ascertain what are the objects of the founders of the charity which the trustees are to carry into effect. By the deed of 18th May, 1849, there is a conveyance of the property to trustees " to the intents, uses, and pur-

poses, and upon the conditions herein set forth." The first direction to the trustees is to provide a schoolmaster for teaching the children in the manner I have stated; then to elect a bailiff to gather, receive, and levy all the issues and profits of the premises, who is to keep the school-house in repair, to pay the schoolmaster's salary, to account for the residue, and to pay all the monies in his hands into a convenient coffer, with four locks and four keys set in such convenient and sure place at the discretion of the trustees, "to be bestowed for the discharge of King's silvers, and for the mending and repairing the highways, bridges, watercourses, and conduits of water, wherewith the inhabitants of the said parish of Ilminster are or shall be charged or chargeable, as far as the said sums of money will extend thereto."

There are two charitable purposes. The school is mentioned first; but the second charity is not ancillary to the first, and is wholly independent and separate from it. There might have been a contemplation by the founders that there would be as great a portion of the rents and profits of the land to go to the repair of the roads and bridges in this extensive parish, as for the maintenance of the school. I do not find any words in the deed of foundation, as Lord Justice Turner supposes, by which
* 508 "education * and learning are declared" to be the principal purpose of the charity.

The proportions applied to the one charity and the other in early times do not appear, but it stands uncontradicted that "in consequence of the application of the said surplus income in the repairs of the said highways and bridges, there has not been any highway rate made or levied in the several tythings of Ilminster Church, Ilminster Tower and Winterhay, in which the town of Ilminster is situated, during the last thirty years.

It is most important for all the inhabitants of the parish, of whatever religious persuasion, that this latter charity should be properly administered, both as to the collection and the expenditure of the fund; and such was the view of the founders.

Immediately after creating the second charity, they thus proceed: "And farthermore to the intent that the deeds of charity aforesaid" (clearly including the repair of highways and bridges) "may have their continuance," the trustees when reduced to four, are directed to convey "to as many honest persons of the said parish of Ilminster to the number of twenty, as shall be by the said gran-

tees thought most convenient to the uses, intents, and purposes afore rehearsed."

The only qualification which the founders require for the trustees is that they be "honest persons of the parish of Ilminster" who are deemed the fittest by the surviving trustees.

There seems in practice always, very properly, to have been a considerable majority of the trustees members of the Church of England. But there having long been a large proportion of the population of the parish belonging to dissenting persuasions, the surviving trustees appear from time to time for more than a century and a half to * have appointed as trustees others * 509 who were not members of the Church of England, such as from their station and respectability were likely to conduct the affairs of the charity with fairness and propriety.

In 1859, according to the practice which had so long prevailed, the trustees, being reduced to the number of five, nominated fifteen inhabitants of Ilminster whom they considered the fittest, and who are allowed to be "honest persons of the parish." Of these, twelve were members of the Church of England, and three were dissenters. The only objection made to the three was their not being members of the Church of England. The Master of the Rolls overruled the objection, and appointed them. Ought the Lords Justices to have removed them from the list, and ordered three others to be substituted who are members of the Church of England? Only upon the supposition that if twenty members of the Church of England were appointed, and one of them were to cease to be a member of the Church of England, he must be removed as disqualified.

If there be any discretion to be exercised as to the removal, there must be the same as to the appointment.

Who can say that the objection here relied upon is an absolute disqualification, like a conviction for felony? If it can reasonably be urged that it would be detrimental or dangerous to the interests of either charity that three of the twenty trustees should be dissenters, although both charities had so long flourished with such an admixture, I admit that they were properly removed; but I think they could only be removed on the ground of expediency under the particular circumstances of each case, and not on the ground of absolute and universal disqualification.

Now, can it be said that it would be against the will of the founders, or detrimental to the interest of either charity, * that * 510

there should be one, or that there should be three, of the twenty trustees, not members of the Church of England, although otherwise unexceptionable? As far as the highways and bridges are concerned, the objection must be untenable. It is obviously of great importance to the inhabitants of the parish that the fund provided for the repair of highways and bridges should be properly collected and applied, and for any thing that appeared before the Lords Justices, the three gentlemen whom they rejected were the fittest, and perhaps the only fit persons in the parish for such duties. The only inquiry which took place was respecting their religious belief. It was strongly urged at the bar, that although a dissenter must be an unfit trustee for the school, a Church of England man need not be a fit trustee for the highways and bridges. But for any thing that appeared before the Lords Justices, one of the three dissenters might be a Macadam, and the members of the Church of England willing to accept the trusteeship, although intelligent and pious, might all be wholly unfit to superintend the repairs of highways and bridges.

Then, with regard to the school, there being seventeen good orthodox Church of England trustees, where would be the peril of a schoolmaster not properly qualified being appointed, or being allowed to continue in the situation if he misconducted himself? May we not give credit to the three dissenting trustees, that they would have the good sense and the good taste to abstain from intermeddling with such matters? And still more may we not give credit to the seventeen Church of England trustees that they will do their duty, and take care that the school is properly conducted?

A danger has been pointed out, that sixteen of the Church *511 of England trustees might suddenly die, and then * the three dissenting trustees outvoting the one remaining Church of England trustee might appoint sixteen dissenters to fill up the vacancies, and thus convert the school into a dissenters' school. But we are not to anticipate the happening of a remote possibility; and if such an abuse were to be attempted, the Court of Chancery would always be at hand to prevent or to correct it.

I have examined all the authorities referred to, but do not find it necessary to comment upon any of them. By far the greater number cited for the respondents only show (what I do not doubt) that this is to be considered a Church of England school, and that the religion of the Church of England ought to be taught in it.

Speaking with the most sincere deference, and the consciousness that I may be mistaken, I find no authority for what is laid down by Lord Justice Knight Bruce, that where there are two distinct charities, such as those established by the deed of 1549, under one set of trustees, "every trustee ought to be a member of the Church of England."

Lord Justice Turner says: "I think that in considering the appointment of new trustees, we are bound to take the charity as we find it existing when the appointment is called for; and if any alteration is to be made in the institution, it must be made by means of a scheme remodelling the administration of the charity." With great submission, when the new appointment of trustees is required for this charity, we find it a charity in which for more than one hundred and fifty years some trustees, who were not members of the Church of England, have been appointed, and have acted to the satisfaction of the parish. If the appointment of trustees is matter of discretion and not to be governed by any rigid rule of law, I conceive that some regard may be had to usage, and that it seems somewhat harsh to alter that * usage, which appears to have worked well, and to have * 512 given contentment for a long course of years.

I am desirous, my Lords, that this case should be decided according to established law. If any farther indulgence should be given to dissenters than can now be claimed by existing law with respect to endowed schools, it can only properly be afforded by the Legislature. But after great deliberation, I am of opinion that the order of the Master of the Rolls, allowing the appointment of these three trustees, was according to existing law, and that the order of the Lords Justices reversing that order ought itself to be reversed.

Nevertheless, my Lords, as I have reason to believe that two of the four Peers who heard the case argued at your Lordships' bar are of a contrary opinion, the result will be an affirmance of the decree appealed against, the question to be put according to the standing order of the House being "That the decree be reversed." Had any important question of law been involved, I should have strongly urged a second argument before a greater number of Peers, instead of acting on the maxim which guides this House upon an equality of votes, "*semper præsumitur pro negante.*" But

as this appeal depends chiefly on the exercise of judicial discretion; and the opinion that may be formed of the comparative importance, in the eyes of the founders, of the school and of the repair of the highways and bridges, so that this judgment can hardly be a conclusive authority in any future case, I am quite contented that the decree of the Master of the Rolls should stand reversed, although, if the appeal to this House had been directly against that decree, upon an equality of votes it must have been affirmed.

* 513 * LORD CRANWORTH. — My Lords, the question for the House to decide is, whether the Lords Justices were right in striking out from the list of the trustees, approved by the Master of the Rolls, the names of three gentlemen whom he had approved, but who, in the opinion of the Lords Justices, ought not to be appointed, on the ground that they were not members of the Church of England.

Whenever the Court of Chancery is called on to appoint trustees of a charity, its duty obviously is to select those who are likely best to discharge the duties imposed on them by the trust; and where the trust is confined to the duty of selecting proper persons to teach or expound the doctrines of the Church of England, or to instruct children in any branches of learning of which the tenets and doctrine of the Church of England are necessarily to form part, and to apply funds for the promotion of that object, it can hardly be doubted that, in the exercise of a sound discretion, the Court will take care that none but members of the Church of England shall be appointed trustees. They will, *primâ facie*, be the persons best qualified to judge of the fitness of those who are to be called on to give the necessary instruction. At the same time, I know of no law making such a selection imperative on the Court; and I desire not to be taken to assent, without farther argument, to the proposition stated at the bar, that in such a trust as I have suggested, where there has been no breach of trust, a trustee, otherwise unexceptionable, can be removed merely because he has ceased to be, or was not at the time of his appointment, a member of the Church of England.

The principle which, in such a trust as I have referred to, would induce the Court to appoint as trustees none but members * 514 of the Church of England, would in like * manner guide it

in the appointment of corresponding trusts, established for the benefit of any religious sect or denomination of dissenters from the Church of England.

But where the trust embraces other objects besides those connected, in the manner I have mentioned, with the Church of England, or with any religious sect or class dissenting from the Church of England, then the principle on which the Court proceeds in selecting as trustees none but members of the Church of England, or of the religious sect or denomination whose principle it is the subject of the trust to enforce, is no longer applicable.

Suppose, for instance, to put an extreme case, a trust at Berwick-on-Tweed, or any other town on the Scotch border, for the instruction of English children in classical learning with religious instruction according to the Church of England, and if the funds should be more than sufficient for that purpose, then the surplus to be employed in the instruction of Scotch children in classical learning, with religious instruction according to the Assembly's Catechism: it could hardly be contended that in such a trust none ought to be trustees but members of the Church of England, more especially if, in fact, there had long been a substantial surplus, after satisfying the first trust; and the question here is, whether this case is not analogous to that which I have put, and whether the Lords Justices did right in reversing the decision of the Master of the Rolls, when he held that the trustees ought not to be, or need not be, exclusively members of the Church of England, by reason of there being objects of the trusts in which other persons, besides members of the Church of England, are interested. I do not think that they did. In cases of this nature, there must always be something left to the discretion of the Judge in the application of the rules bearing on the subject. The rule appears to have been laid down * correctly by the Master of the Rolls; * 515 and the only question is, whether the trusts beyond those for the school were of sufficient importance and magnitude to make their existence a proper element to be taken into account in appointment of trustees: I think they were. More than a fourth part of the income of the charity arises from a sum of Consols, accumulated from the surplus rents remaining after providing for the wants of the school; and it appears by the affidavit of John Baker, filed on the 28th of April, 1858, that the surplus income, after providing for the claims of the school, has, for the last thirty

years, been sufficient to relieve the inhabitants of Ilminster from the burthen of a highway rate. This is no inconsiderable benefit, and is one in which all the inhabitants, dissenters as well as churchmen, are interested. If this had been the only trust, no one could doubt that a trustee need not be a churchman. And I cannot think it was unreasonable to hold that, in respect of this trust, some dissenters might properly be appointed. The dissenting inhabitants of the town might well consider that their interests required the appointment of some of their own body to take care that an undue portion of the trust funds should not be absorbed in the first trust. It was argued that all the inhabitants, churchmen as well as dissenters, were interested in the trusts of the surplus; and so that the trustees, even though they should all be churchmen, would have an interest to protect the interests of dissenters, as well as their own. That is true; but in appointing trustees of a charity, in which all classes and sects are interested, I do not think the Court would be exercising a sound discretion in appointing none but those of the most influential class. The object of the Court is to make such an appointment as shall not only secure a due and impartial administration of the trusts, but as shall
* 516 also, as far as possible, satisfy all persons * concerned that their interests are duly watched and cared for.

Suppose that this charity, instead of having been founded in the reign of King Edward VI., had been founded only a century ago, and that the trust for the school had been expressly confined to the instruction of children of some dissenting sect, Baptists, for instance, or Independents, or Quakers: if the Court, on being called on to appoint new trustees, had approved a list containing three or four members of the Church of England, I cannot think that the discretion so exercised could properly be questioned on a re-hearing or appeal. With this view, I cannot say that I am satisfied that the Master of the Rolls exercised his discretion unwisely, or that the course he took was such as to warrant the order now appealed from. But, for the reasons stated by the Lord Chancellor, the result will be that the decree of the Lords Justices will be affirmed.

LORD WENSLEYDALE. — My Lords, the only difficulty in this case arises from the circumstance that, under the foundation deed, 18th May, 1549, the trustees have a double duty to perform, — to

appoint a schoolmaster, and pay his salary, and keep his house in repair, and to expend the residue of the issues and profits of the land conveyed to them in repairing the highways, bridges, water-courses, and conduits, with which the inhabitants of the parish of Ilminster were chargeable.

If their duty had been to appoint and pay a schoolmaster only, and repair his house, the Master of the Rolls and the Lords Justices would not have differed in opinion. They would have agreed that where the Court had a discretion to appoint fresh trustees for the management of a school in England, where the intention of the founder was to provide for the religious instruction of the scholars, it * must be taken to be, *primâ facie*, accor- * 517 ding to the doctrines of the Church of England, and that the trustees to be appointed, in the full exercise of the discretion vested in the Court of Chancery for the greater certainty of obtaining that object, ought to be members of that Church. There were several previous *dicta* and decisions to this effect. I may mention the *Chelmsford Grammar School Case*,[1] before Vice-Chancellor Wood, and the previous authorities there cited. In this case the deed recites the wish of the founders, for the virtuous education of youths in literature and godly learning, whereby they should be brought up the better to know their duty to God and their King; and it directs them to appoint an honest and discreet person to be a schoolmaster, who shall freely instruct, teach, induce, and bring up, as well in all godly learning and knowledge, as in other manner of learning, all such children and youth as should be brought to him. There is no doubt they must have meant religious instruction to be a most important, if not the primary object of this education, and that according to the doctrines of the Church of England, which certainly then existed, for its existence must be taken to date from its final separation from Rome (Short's History of the Church of England, section 201). That all its doctrines were not formally settled by lawful authority until afterwards, makes no difference in this case. The rule on which the Courts of Equity have acted requires that, to secure an education for the children according to the doctrines of the Church of England, the master must belong to that church, and the trustees also who appoint him, though this will not prevent the benefits

[1] 1 Kay & J. 543.

of the school from being extended to the children of dissenters according to the recent Act, 23 Vict. c. 11. The only ques-
* 518 tion here * is, what description of persons ought to be appointed as trustees. On this part of the case I conceive there is no doubt.

But the difficulty arises from the introduction into the deed of the trust to apply the surplus of the issues and profits to the repairs of the highways, &c., in the parish. For the performance of this part of the trust, dissenters are quite as fit as the members of the Church of England. They are exactly on the same footing. Religious opinions form no part of the qualification of a trustee for laying out money for these purposes. Accordingly the Master of the Rolls, in the exercise of his discretion, thinking that the surplus might be considerable, and that the application of it did not form an insignificant part of the duties of the trustees, appointed some dissenting trustees. The Lords Justices thought that the objects of the charity not connected with education were secondary and subordinate, and that the primary object was to be attended to.

We are not informed what precise part of the surplus was at the time of the execution of the deed, or is now, available to the second purpose mentioned in the deed, so as to judge of its relative importance; but, looking at the terms of the deed and the recitals, I think it clear that education in godly and other learning was its principal object; and in order to carry that object into effect, those who were fitted to execute the duties of trustees connected with education, namely, members of the Church of England, and equally fit to discharge the other duties unconnected with it, are the proper persons to be appointed. The case differs from that supposed by my noble and learned friend opposite, of the foundation of a school at Berwick-on-Tweed on the principles of the Church of England, and the surplus, if any, to be devoted to education on the principles of the Church of Scotland,
* 519 where members of the Church * of England would be the proper persons for the former purposes for administering the former part of the trust, and improper for managing the latter part. Here members of the Church of England are the best trustees for one trust, and equally good for both trusts. I think, therefore, that the Lords Justices have exercised a proper discretion in the appointment they have made.

It is said that the members of the Church of England, if exclu-

sively appointed, might be disposed to expend more money on education, and so unduly diminish the sum applicable to the repairs of highways. But that cannot be said with any degree of certainty. It would depend on the peculiar character and feeling of the trustees, and must be a matter of accident, and would be very difficult for any Court to ascertain beforehand in making those appointments, as to which it must necessarily act upon some general principle. In the ordinary course of things, the members of the Church of England must be assumed to have an equal interest in carrying into effect both the objects of the trusts. On the other hand, if dissenters were appointed, it might be said that they would have naturally an inclination to diminish the funds applied to the school for the purpose of education on principles some of which they disapprove, and to increase those applicable to a purpose in which they would have a personal interest as inhabitants. No doubt in ordinary instances that might occur, though that feeling would be diminished when the education in the school was extended, as it may be, to the children of dissenters. But, on the whole, I think we ought to act upon general principles. I think those trustees should be appointed who are assumed to be the fittest for one object of the trust, and equally fit for both, rather than those who are assumed, generally speaking, to be less fit for one object.

* I cannot, therefore, think that the Lords Justices exer- * 520
cised their discretion improperly, and I advise your Lordships to affirm the judgment of the Lords Justices.

Lord Chelmsford. — My Lords, there has never been throughout the protracted litigation in this case the least appearance of a doubt in the minds of those who have had to decide the question, that under the foundation deed of the 18th May, 1549, the school to be established was a school in which religious instruction was to be given in conformity with the doctrines of the Church of England. Therefore, if the deed had provided for this object alone, it is clear that the Master of the Rolls and the Lords Justices would not have differed in their opinions, and that the judgment of my two noble and learned friends, with whom I have the misfortune to differ, would have been in accordance with that of the Lords Justices. The same uniformity of opinion would also have existed if all could have been brought to agree that the objects to

which the surplus funds are to be applied, after satisfying the demands of the school, were in the estimation of the founder of inconsiderable importance, and entirely subordinate in his mind to his primary and paramount intention. The sole ground of difference, therefore, is, whether the directions given for the application of "the residue of the issues and profits of the premises" are sufficient to extend the otherwise restricted character of the trust, so as to admit to its administration persons entertaining religious opinions which, without these additional objects, would have rendered it improper that they should have been appointed trustees.

In construing the deed, I think we ought not to lay any stress upon the instances in which, during the last one hundred and fifty years, dissenters have been appointed trustees, be- * 521 cause * they commence at too remote a period from the date of the deed to be regarded as a contemporaneous exposition of it, and they may fairly be accounted for by the more liberal notions which had grown up in those times towards dissenters, and which, a few years before the earliest of them, had given birth to the Toleration Act. I may be permitted, however, to express my regret that the friendly feelings which have subsisted so long without any apparent prejudice to the trust, should have been disturbed, and that the courts should now be called upon for the first time to put a judicial construction upon the foundation deed.

I consider, too, that we ought equally to disregard the argument, that two or three dissenting trustees in a body of twenty-one are not likely to be able to occasion much prejudice to the trust, because this would apply equally if the school had been the only object provided for by the deed; and it may be retorted by supposing the case of a majority of the trustees being dissenters, which my noble and learned friend, the Lord Chancellor, properly thinks ought never to be the case, but which might very well happen if they have a right to be appointed at all.

These, and other similar arguments, might well be urged if the application was to the mere unfettered discretion of the Judge; but the judgment to be exercised must be controlled by the directions of the deed, and must conform to the intention of the founder. In estimating the probable importance of the residuary objects of the founder's bounty, we are wholly without information applicable to the time when the deed was executed, as to the amount of

the funds devoted to the different purposes, and whether there was likely, at that period, to be any surplus, and, if any, to what amount, after providing for the demands of the school. We are left, therefore, to gather, from the deed itself, that * the one great object in the mind of the grantor, * 522 without which it is plain it never would have been made, was the foundation of a school "for the virtuous education of youth in literature and godly learning." The whole of the deed, with the exception of a few short lines, is devoted to this single purpose. When fully satisfied, then, but not till then, any residue which remained was to be applied to the other purposes mentioned.

My noble and learned friend, Lord Cranworth, in order to show the importance of the directions as to the application of the surplus, refers to a passage from the affidavit of Mr. Baker, which states that "the surplus income, after providing for the claims of the school, has, for the last thirty years, been sufficient to relieve the inhabitants of Ilminster from the burthen of a highway rate," which, my noble and learned friend justly observes, is no inconsiderable benefit. And this circumstance has also been relied upon by my noble and learned friend, the Lord Chancellor. I cannot help, however, drawing an opposite inference to that which has been drawn by my two noble and learned friends from this statement. As the relief afforded to the inhabitants by this application of the surplus can only be carried back for a period of thirty years, it furnishes a proof to my mind that, prior to this time, the school absorbed the whole, or nearly the whole, of the funds, and left little or nothing to be applicable to the ulterior and subordinate objects mentioned in the deed.

Upon this state of things, the Master of the Rolls was of opinion "that persons dissenting from the doctrines of the Church of England are eligible to be appointed, and to act as trustees of the charity," and he therefore confirmed the appointment which had been made. The word "eligible," as here used by the Master of the Rolls, is ambiguous. It may mean either "legally qualified," or "fit * to be chosen." Now it possibly may be * 523 the case that, from the absence of words of exclusion in the foundation deed, there may be no express absolute disqualification of dissenters for the trust, and therefore, if they should happen upon any occasion to be appointed, there may be no sufficient

ground for removing them. And no more than this appears to be necessarily involved in the guarded order of the Master of the Rolls.

But the Lords Justices, with more accuracy and precision, distinctly deciding the only question which could properly be considered, came to the conclusion "that persons, not members of the Church of England, ought not to be appointed trustees of the charity."

If this was merely a question between dissenters and members of the Church of England as to their comparative fitness to execute trusts, of which some were qualified for all, and others only for some, I should have thought, with my noble and learned friend (Lord Wensleydale), that, upon a question of selection and preference, "those persons ought to be appointed who are assumed to be the fittest for one object of the trust, and equally fit for both, rather than those who are assumed, generally speaking, to be less fit for one." But I prefer to place my opinion upon a broader ground. I look to the deed itself, and to the duties which the trustees have to discharge; to the important purpose in view, the establishment of a school for religious instruction, and to the important power of appointing and removing a schoolmaster, who is to instruct, teach, and bring up children in godly learning and knowledge; and thus, from the great and essential objects of the deed, collecting the intention of the founder, I ask whether it is possible, with such objects, he could have meant ever to confide to dissenters the charge of a trust which he would know they might feel conscientiously bound to endeavour to defeat, * 524 * and into which, if one trustee of that description were once admitted, there would be nothing to prevent the whole body, or a majority of it, being in the course of time thus composed?

There is nothing at which the dissenters ought justly to take umbrage in their being excluded from the description of "honest persons of the parish of Ilminster," which merely here means persons of good character of those religious opinions capable of properly exercising the trust. I think that the Lords Justices were correct in the opinion they expressed, that members of the Church of England were alone fit to be appointed trustees under the deed of foundation, and that their decree ought to be affirmed.

THE LORD CHANCELLOR.—The question I have to put is, that

the decree appealed against be reversed; but there is an equality of votes, and therefore the decree will be affirmed. Under the circumstances of this case, I suppose the appeal will be dismissed without costs.

LORD WENSLEYDALE. — Certainly, there is no doubt it ought to be without costs.

Mr. Roundell Palmer. — Perhaps it would be more regular to ask your Lordships to declare that the trustees, the respondents, are to have their costs out of the charity fund.

LORD CRANWORTH. — Will it not be unnecessary to say that?

Mr. Roundell Palmer. — It may be as well to avoid any question about it.

LORD CHELMSFORD. — There is no objection to our making such a declaration.

Decree affirmed. Appeal dismissed; the costs of the trustees to be paid out of the charity estate.

Lords' Journals, 19th July, 1860.

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* BEAVAN v. MORNINGTON. * 525

1860. May 22, 23; June 4; July 19.

JOHN PHILLIPS BEAVAN, *Appellant.*
The Countess of MORNINGTON, *Respondent.*[1]

Decree. Time for Enrolling. What Orders brought up. Disability.

Signing and enrolling decrees in the Court of Chancery are acts in a suit. They are parts of the procedure of the Court, and may, therefore, by virtue of its inherent power, be regulated by the orders of the Court. They may be so, though an order limiting the period for enrolment may indirectly affect the power of a suitor to appeal against a decree.

The general orders of the 7th August, 1852, limiting the time for enrolment (except by leave of the Court) to five years, are therefore valid.

Where a decree in one suit has been acquiesced in for more than five years, and

[1] Monypenny v. Monypenny, 9 H. L. Cas. 149.

the time for enrolling it has been allowed to go by, so that it cannot be enrolled except by leave of the Court, the fact that a decree of an opposite kind has been pronounced in another suit arising out of the same circumstances (but pending between different parties), does not afford a ground for enlarging the time for enrolling the decree in the first suit, so as to enable the party against whom it was pronounced to appeal to this House.

An appeal against an order on farther directions will not have the effect of bringing up the decree on which it was founded.

The rule in De Burgh *v.* Clarke (4 Clark and F. 562), and Attwood *v.* Small (6 Id. 232, 309), applies only to an appeal against a final decree, which appeal will bring up the previous interlocutory orders.

A party to a suit was himself a solicitor: he was abroad when a decree was pronounced against him, but on that and on subsequent occasions he was represented by solicitor and counsel: —

Held, that he could not be treated as a party under "disability," so as to have the rules of the Court relaxed in his favour.

THE appellant is a solicitor. The respondent is the widow of the late Earl of Mornington, formerly William Pole Tylney Long Wellesley. She was his second wife, and in 1834 they agreed to live separate from each other. Certain articles of separation were executed, by which some provision was made for the respon- * 526 dent, and she * believed that she was entitled, as incumbrancer, to rights over some of the property still remaining subject to the disposition of the Earl. This question was decided in her favour in 1839.[1] A supplemental bill was filed in 1847, to which the appellant, one of the creditors of the Earl, was for the first time made a party. The appellant claimed to be an incumbrancer on the Earl's property, and insisted that he, as such, had priority over the respondent. The case was heard before the Vice-Chancellor of England on 21st July, 1849, and his Honour, expressly adopting the rule laid down in the first of these cases, decided the question of priority in favour of the respondent. By the decree then made accounts were directed, and farther directions reserved.[2] The cause was heard before the Lords Justices on farther directions, in March, 1853, when they made an order for carrying the decree of 1849 into effect, reserving leave to any of the parties to apply. In July, 1854, the respondent enrolled the decree of 1849. In July, 1855, an order was made directing that certain inquiries which had been ordered to take place before the Master should be heard before the Vice-Chancellor himself. In

[1] Wellesley *v.* Wellesley, 10 Sim. 256, 4 Mylne & C. 561.

[2] 17 Sim. 59.

July, 1856, the appellant filed a bill against the respondent, reciting the proceedings that had already taken place, and praying for certain relief. This bill was amended in March, 1857, and, in the amendment, the decree of July, 1849, was distinctly referred to, and it was alleged that the interests of the appellant ought not to be postponed to those of the respondent. It was also alleged, that if the accounts were properly taken there would be sufficient to answer the claims of both parties, and "under such circumstances the plaintiff (the appellant) has not yet taken any steps to procure the last-mentioned decree to be varied." In * March, 1858, on a bill filed by the respondent against * 527 Mr. Daniel Keane and others, who claimed priority over her as incumbrancers on a house of the Earl in Saville Row, the Lords Justices gave a decision which was adverse to the respondent's claim,[1] and which the appellant conceived to amount to an overruling of that which had been pronounced against himself in 1849. As more than five years had elapsed since it was pronounced, he applied, under the terms of the general orders of August, 1852, for leave to enroll the order on farther directions of March, 1853, for the purpose of bringing it up by appeal to this House. This application came on to be heard before the Lords Justices in November, 1858, when leave was refused.[2]

The appellant then, on the 17th February, 1859, presented his petition of appeal to this House, complaining of the decree of 1849, of the order of 1853, and of the refusal to allow enrolment pronounced in November, 1858; and prayed for a reversal or variation of the decree of 1849, of parts of an order made thereon in 1852, and that he might be allowed to enroll the orders of March, 1853, and July, 1855, for the purpose of appealing against them, and that the order of November, 1858, might be reversed. The respondent, on the 14th March, 1859, presented a cross petition, praying that the appellant's petition of appeal might be dismissed with costs. This petition was heard by the Appeal Committee on the 6th April, 1859, when it was ordered that the petition of appeal should be amended by striking out so much of the prayer as related to the decree of July, 1849, and the general order of August, 1852, and that the appeal should be confined to the order of the Court of Chancery of November, 1858. The petition was,

[1] Nom. Mornington v. Keane, 2 De G. & J. 292.

[2] Nom. Wellesley v. Wellesley, 28 Law J., N. S. Ch. 1.

* 528 * therefore, now confined to a prayer to be allowed to enroll the orders of March, 1853, and July, 1858, and to reverse the order of November, 1858.

Sir Hugh Cairns and *Mr. W. Cole* for the appellant. — There are two questions here. The first, and most important is, whether the Court of Chancery, by making a general order, possesses the power to bar the suitor's access to this House? The next is, whether, in this case, the Lord Chancellor rightly exercised the discretion vested in him by the general order of the Court (supposing it not to be *ultra vires*), when he refused leave to enroll the decrees of 1849 and 1853?

As to the first point, some of the provisions of the general orders of 1852 are *ultra vires*. The second of them restricts the time of enrolling to six calendar months, unless by special leave of the Court; and the third declares how that leave is to be obtained. The fifth directs that no enrolment shall be allowed after five years, but the sixth gives the Lord Chancellor power to allow an enrolment after that time. Enrolment is absolutely necessary to enable a party to appeal; *Andrewes* v. *Walton*.[1] When a decree is enrolled, it is signed by the Lord Chancellor; it is not complete till then, but then it becomes complete, and may be brought up here. So that, by the effect of these orders the suitor's power of appealing against a decree of the Court of Chancery is restricted by the act of that Court itself; in other words, the inferior Court has assumed the power to impose a limit on the superior Court in inquiring into its decisions. Such an assumption is clearly *ultra vires;* a power of this kind can * 529 * only be conferred by statute, and there is no pretence for saying that it has been so conferred here. The 3 & 4 Wm. 4, c. 94, § 22, does not confer it. Enrolment is a ministerial, and not a judicial act; *Dimes* v. *The Grand Junction Canal Company*.[2]

[THE LORD CHANCELLOR. — If it is merely a ministerial act, may not the Court say that it shall only be done within a certain time?]

No, not when it is an act which is necessary to open the way to a hearing before the superior tribunal. The 3 & 4 Vict., c. 94,

[1] 8 Clark & F. 457. [2] 3 H. L. Cas. 759.

does not confer any such power as is here assumed; for the first section of that statute defines the extent of the power by the use of the words, "in the form and mode of drawing up, entering, and enrolling decrees." Not one word is there to be found as to limiting the time within which they shall be enrolled; besides which, the powers there given are to be exercised within five years from the passing of that statute, and the 8 & 9 Vict. c. 105, § 1, which extended the time to ten years, had no effect after 1850. And both those Acts required the orders to be laid before Parliament, which has not been done with respect to these orders. It is clear, therefore, that these orders can claim no statutory authority.

But here the refusal to enroll the decree of 1849, though wrong in itself, will not have the effect of preventing that decree from being considered by this House. The subsequent decrees have been enrolled, and are appealed against, and that will operate to bring under consideration the former decrees in the same suit. *Brooke* v. *Champernowne*,[1] where the possible inconvenience of allowing decrees long made to be enrolled and appealed against was fully considered, and the easy mode of obviating that inconvenience * pointed out by Lord Chancellor Cotten- * 530 ham.[2] *De Burgh* v. *Clarke*[3] and *Attwood* v. *Small*[4] are to the same effect; and *Kay* v. *Smith*[5] throws the burden of showing why there should not be an enrolment on the party resisting it.

[LORD CRANWORTH.—The observations made by the Court in that case applied only to the particular words of the third of these orders.]

These orders are not valid in virtue of any inherent power of the Court. An appeal is a matter of right; like a writ of error at common law, it is *ex debito justitiæ*. It follows, then, that no inferior Court has the power to say that the suitor shall not exercise this right except at the discretion of the Court. The superior Court may, perhaps, put a limit on the right, but the inferior Court cannot do so. The Legislature alone has the undoubted power to put a limit on the exercise of the right.[6] There was a time when there was no limit as to the time within which a writ of error might be brought: the 10 & 11 Wm. 3, c. 14, first imposed twenty

[1] 4 Clark & F. 247. [2] 4 Clark & F. 255. [3] 4 Clark & F. 562.
[4] 6 Clark & F. 232, 309. [5] 7 De G., M. & G. 383.
[6] See an opinion of Attorney-General Northey on this subject, cited in Clark's Colonial Law, 111, n. 9.

years as the period within which a writ of error must be sued out. The 15 & 16 Vict. c. 76, § 146, made six years the limit, but in the next section protected the subject against possible injustice by provisions as to cases of disability. The Courts of common law have never affected to create by order a limit different from that which the Legislature had created. Here the Court of Chancery has affected to do that, and, farther, has thereby infringed on an order of this House, for it has in effect shortened the period which this House has allowed for bringing an appeal.[1] A decree * 531 in equity is a judgment, * and an appeal against it is in the nature of a writ of error; *Edwards* v. *Carroll*.[2] The Court of Equity ought, therefore, to follow the analogy of the Courts of law; and *Lawrence* v. *Blake*[3] and *Lambert* v. *Peyton*[4] show that on principle this House will not favour obstructions to the exercise of the right of appeal.

Then as to the exercise of discretion in this case: the appellant was under disability; he was abroad. The standing order of 1725 makes an exception in favour of such a person.[5]

[THE LORD CHANCELLOR. — He resided at Boulogne, but he was well represented by able solicitors and counsel.]

Mr. Rolt and *Mr. Freeling* for the respondent. — The direction to enroll within a limited time does not directly affect the power to appeal to this House, for this House dates the time for appealing from the enrolment, and not from the date of pronouncing the decree; *Lambert* v. *Peyton*.[4] It can only indirectly affect the power of appealing; it is an order relating to the practice of the Court, and therefore the Court has an inherent right to make it. The power to make orders of this kind has always been exercised by the Court. Decrees were not enrolled until the 36 Hen. 8.[6] Before that time the bill and answer were filed, and the decree was indorsed on the record in Latin, according to the forms of proceeding in the civil law. Lord Bacon first made rules reducing the subject-matter into order. He directed that "decrees granted at the Rolls are to be presented to his Lordship, with the

[1] Two years from the time of enrolment, and fourteen days of the next Session. Order 22, June, 1829, 6 Clark & F. 976.

[2] Cited 1 Brown, P. C. 461.

[3] 8 Clark & F. 504.

[4] 7 H. L. Cas. 423.

[5] 6 Clark & F. 976.

[6] Lansd's MSS. (Brit Mus.) No. 163, fol. 199.

orders whereupon they are drawn, within two or three days after every term."[1] Then came the orders * of Lord Commissioner Whitelocke,[2] made during the time of the Commonwealth, by one of which he directed that "all decrees and dismissions pronounced upon hearing the cause in this Court be drawn up and signed and enrolled before the first day of the next Michaelmas or Easter term after the same shall have been pronounced respectively, and not any time after, without special leave of the Court." These were adopted, and re-enacted in their very words by Lord Clarendon after the restoration.[3] But these orders came gradually to be disregarded, so that at one time to ask the leave of the Court appeared to be a mere matter of form, *Man* v. *Ricketts*,[4] and it was found necessary to remedy that evil. These orders were accordingly made; but they cannot be impugned on the ground that they affect the power of appealing, since the Court of Appeal has always the authority to do in any individual case what seems just, notwithstanding such an order in the inferior Court; *Wood* v. *Griffith*.[5]

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The object of this appeal is, by obtaining leave to appeal against the order of 1853, to bring the decree of 1849 into discussion, and *Brooke* v. *Champernowne*,[6] *De Burgh* v. *Clarke*,[7] and *Attwood* v. *Small*,[8] are cited to show that that may be done, but they do not warrant such an argument. They only show, and the last of them distinctly expresses the rule, that "when the final decree is appealed from, the previous interlocutory orders follow its fate." But upon these cases the attempt is now made to bring up a final decree, the time for appealing against which has long passed, by appealing against orders consequential upon it, and merely issued to carry it into * effect. The distinction between those cases and the present is complete.

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The discretion which the general orders vest in the Lord Chancellor was well exercised. The appellant, though not actually present in Court, appeared from time to time by solicitor and counsel, and not only appeared as a defendant, but instituted a suit, and contested the matter throughout. He cannot, therefore, in

[1] A. D. 1618, No. 42. Sanders' Orders in Ch. 115.
[2] A. D. 1649, No. 68. Sanders' Orders in Ch. 237.
[3] Sanders' Orders in Ch. 308.
[4] 1 Phill. 530.
[5] 19 Ves. 550.
[6] 4 Clark & F. 247.
[7] 4 Clark & F. 562.
[8] 6 Clark & F. 234, 309.

any way pretend that he laboured under any disability which entitles him to the indulgence of the Court. This, too, is a matter of discretion, and when that is so, the exercise of it will not be submitted to review: *Tadman* v. *Wood*.[1]

Sir H. Cairns replied.

July 19.

THE LORD CHANCELLOR (LORD CAMPBELL).—My Lords, in this case we have two questions to consider; first, whether the general order of the Court of Chancery, made in August, 1852, respecting the enrolment of decrees and orders, be *ultra vires* and void; and, secondly, whether the order of the Lord Chancellor, pronounced in November, 1858, now appealed against, ought to be reversed, on the ground that he improperly exercised the discretion vested in him by the general order.

The appellant, in his petition, sought leave to appeal against this general order. On a reference to the Appeal Committee, a decision was given (I think most properly) confining this appeal to the order of the Lord Chancellor, pronounced in November, 1858; but although the general order clearly was not the subject of appeal to this House, the appeal against the order of November, 1858, being competent, and the validity of that order de-
* 534 pending upon the * validity of the general order, the appellant's counsel, in support of this appeal, were fully entitled to argue that the general order was *ultra vires* and void.

And if the object of the general order of the Court of Chancery had been, as was argued, to control the authority of this House as a Court of Appeal, and to abridge the time given by the standing orders for appealing to this House, I should, without hesitation, have pronounced it to be void, notwithstanding the seven great names subscribed to it, Lord St. Leonards, then Chancellor; Sir John Romilly, Master of the Rolls; Lord Justice Knight Bruce; Lord Cranworth, then a Lord Justice; Lord Justice Turner, then a Vice-Chancellor; Vice-Chancellor Kindersley, and Vice-Chancellor Parker, who, as he is now no more, I may venture to characterize as a consummate equity Judge.

I do not think that the validity of this general order can be rested on 3 & 4 Wm. 4, c. 94, or any of the subsequent statutes

[1] 4 A. & E. 1011.

empowering the Lord Chancellor, with the advice and assistance of the other Judges of the Court, to make orders which could not be made by its inherent authority. But I am of opinion that the time of enrolling decrees is matter of mere procedure, which the High Court of Chancery, by its inherent authority, may regulate.

It has been truly said by the appellant's counsel that, although a decree is valid for many purposes from the time it is pronounced; and may be enforced before it is signed, it must be signed by the Lord Chancellor before it is a perfect decree. I say the same of enrolment. Enrolment of the decree has been a step in the suit, at least ever since the time of King Henry VIII., that there may be an authentic memorial of the judgment pronounced, and of the antecedent proceedings in the suit, which may in all time to come establish the rights of the parties and of those claiming under them.

*To obviate all dispute on this subject, and to guard *535 against the evils of delay, may not the Court determine within what time, after the decree has been pronounced, it shall be signed and enrolled? After a lapse of years disputes may arise respecting the terms of the decree, and the Lord Chancellor may have resigned his office, or may have died. The signing and enrolment are acts in the suit within the Court of Chancery, unconnected with any purpose to appeal to the House of Lords, and would be equally requisite if no appeal was given to any higher tribunal. Such matters have been regulated by general orders from very early times. Lord Bacon's orders of 1618 have been considered chiefly a consolidation of former general orders, and among them are to be found the two which have been read in the course of the argument, one of which expressly fixes a limit of time for presenting decrees for signature. And it would appear that, by the practice of the Court, enrolment followed immediately after the decrees were signed by the Lord Chancellor, without any consideration of an appeal to the House of Lords.

Later in the same century, when the Republic had been established under Cromwell, when the House of Lords had been voted useless, and had been abolished by an ordinance of the Commons, Lord Commissioner Whitelocke, while presiding in the Court of Chancery, to remedy the evils which had been experienced from the delays in signing and enrolling decrees, made a general order also limiting the time for enrolment, unless by special leave of the Court.

In those times we know that such orders were rigorously enforced, and there is great reason to believe that this order of Lord Commissioner Whitelocke had been found effectual and salutary; for in 1661, soon after the Restoration, it was adopted in * 536 the same identical words by Lord * Chancellor Clarendon, and it has usually gone by the name of Lord Clarendon's order. It remained in force, that is to say unrepealed and unaltered, down to the year 1852. But I am sorry to say that it was found ineffectual to counteract the tendency to procrastination which was formerly supposed peculiarly to distinguish the Court of Chancery. Although the enrolment after the specified time was forbidden "without special leave of the Court," a laxity of practice seems to have been gradually introduced, and by the middle of the eighteenth century this leave seems to have been obtained at any time, however distant, by going through an unmeaning form. Still the form was gone through of asking for the leave; and in order to obtain it, a motion must have been made, or petition presented, at the Rolls, praying that the decree might be enrolled *nunc pro tunc*, against which it was understood that no cause could be shown, and therefore an order was made as a matter of course.

Can it be alleged that the order of Lord Commissioner Whitelocke and of Lord Clarendon was *ultra vires* and void? Could not the Court regulate the time for signing and enrolling the decree as much as the time within which an answer should be put in to a bill?

Your Lordships' standing order of 24th March, 1725, which regulates the time within which there may be an appeal from a Court of equity to this House, makes the time to run from the signing and enrolling of the decree. Those who framed it no doubt considered that this was the time when the decree was perfect, and gave credit to the Court of Equity that the signing and enrolling of the decree would be properly regulated, and would take place within a reasonable period after the decree was pronounced. The standing order of this House could not be intended to have, and could not have, the effect of depriving the * 537 * Court of Chancery of the power of regulating its procedure respecting the signing and enrolment of decrees. An abuse of that power is not to be anticipated any more than the abuse of

any other discretionary power vested by the constitution in any Court of justice or public functionary.

If, then, there is any inherent power in the Court of Chancery to regulate the time when decrees are to be enrolled, can it be said that this power is abused by the general order of 7th August, 1852?

Sir Hugh Cairns contends that the fifth and sixth regulations are *ultra vires* and void. They are:—

V. "That no enrolment of any decree, order, or direction, shall be allowed after the expiration of five years from the date thereof."

VI. "That the Lord Chancellor, either sitting alone, or with the Lords Justices, or either of them, shall be at liberty when it shall appear to him under the peculiar circumstances of the case to be just and expedient, to enlarge the period hereinbefore appointed for a re-hearing, or an appeal, or for an enrolment."

Can it be said that there is here shown any disposition to control or to interfere with the jurisdiction of your Lordships as a Court of Appeal? Can any real hardship be felt when parties as of right may enroll a decree during five years after it has been pronounced, and the Lord Chancellor or the Lord Chancellor with the Lords Justices are empowered, when it shall appear to them under the peculiar circumstances of the case to be just, to enlarge the period for enrolment?

According to the decision in the case of *Brooke* v. *Champernowne*,[1] the time limited by your Lordships' standing * order runs from the enrolment of the decree, and not * 538 from the time when the decree was pronounced; but this House must have contemplated that the Court of Chancery would, as occasion required, regulate the time of doing the act from which the period for appealing would date, and would not leave the time for appealing absolutely indefinite. Were it not for the confidence entertained that there would be a period fixed for the enrolment by the Court below, this House would no doubt have made the period for the appeal to run from the pronouncing of the decree; and the Court of Chancery, by fixing the time for the enrolment, assists instead of obstructing the intentions of this high Court of Appeal.

If the general order of 1852 was *ultra vires*, and the appellant

[1] 4 Clark & F. 247.

was entitled as a matter of right at any time, however remote from the making of the order of 1853, to have it enrolled, we are bound to give judgment in his favour, the Lord Chancellor, by refusing the enrolment, having acted without authority. But if by virtue of the general order he had a discretion to permit or to refuse the enrolment, we have now only farther to consider whether the discretion exercised by the Lord Chancellor in refusing the enrolment ought to be overruled. I consider it unnecessary to express my opinion upon the question raised at the bar, whether, if after the expiration of the period for enrolling a decree or order, a petition being presented to the Lord Chancellor to enlarge the period for enrolment, under alleged peculiar circumstances, he upon a full and fair hearing has exercised his discretion, and has either granted or refused the prayer of the petition, there may be an appeal to this House against his decision. I am clearly of opinion that in this case the Lord Chancellor, when he dismissed the petition, wisely exercised his discretion. I think that * 539 under the peculiar circumstances of * this case, it would have been unjust and inexpedient to enlarge the time for the enrolment.

What may reasonably be considered the nature of the "peculiar circumstances" which the framers of the order had in view when they gave a power of enlarging the periods appointed for a rehearing, or appeal, or for an enrolment? I should think they would be where the party being under some actual disability, or by ignorance of law, or by some *vis major* or *casus fortuitus*, had been prevented from doing the act within the prescribed period. But Mr. Beavan is himself a lawyer; he was fully aware of the decree of 1849, and of the order of 1852; neither sickness nor poverty prevented him from enrolling or appealing against the decree, or the order; but he had acquiesced for eleven years in the decree which decided that Lady Mornington's incumbrance had priority over his, and he had acquiesced for more than five years in the order of 1853, made to give her the fruits of the decree. It is idle to talk of his waiting to see whether there might not be sufficient funds from the estate of Lord Mornington for both, or that he was induced to forbear by any representation of Lady Mornington. He acquiesced because he believed that it was hopeless to appeal to this House against the decree of Lord Chancellor Cottenham, affirming that of the Vice-Chancellor of Eng-

land. What then was the "peculiar circumstance" which induced him to petition the Lord Chancellor in November, 1858, to enlarge the time for the enrolment of the order of 1853? The "peculiar circumstance" was the decision of the case of *Lady Mornington* v. *Keane*. I have not inquired, and I do not think that I am bound to inquire, or that I ought to be influenced by inquiring, whether the decision in *Lady Mornington* v. *Keane* is, or is not, at variance with the decree in *Lady Mornington* v. *Beavan*. Assuming that, after the usual time for appealing has been allowed to expire, from the belief that * there was no ground for ap- * 540 pealing, there is a subsequent decree in another suit, made by a Judge of co-ordinate authority, which is at variance with the decision so long acquiesced in, can this be a sufficient reason for again dragging into litigation a party who has had every reason to believe that his rights were finally established by the judgment of a supreme Court long acquiesced in? *Interest reipublicæ ut finis sit litium*. To Lady Mornington, I think that there would not only be a hardship, but an injustice, if after having had for above eleven years a judgment entitling her, as against Mr. Beavan, to the enjoyment of the provision intended for her, and after having borrowed money for her urgent necessities on the credit of the judgment in her favour, Mr. Beavan should be enabled again to renew a contest which, although she was obliged to sue *in formâ pauperis*, she had reason to believe she had brought to a successful issue.

For these reasons, I think that Lord Chancellor Chelmford's decision must be considered quite correct, whatever opinion may be formed on certain other points which were discussed at the bar.

The appellant, not pretending that if the decree of 1849 stands, he is at all aggrieved by the order of 1853, or that the order of 1853 does not legitimately follow from the decree of 1849, suggests that although he may not be able to appeal directly against the decree of 1849, he may be so indirectly; and that if an appeal were allowed against the order of 1853, the decree of 1849 would be brought before your Lordships, and might be reversed. I must say that this seems to me to be contrary to the well-known maxim, that the law will not permit that to be done indirectly, which the law forbids to be done directly. I was exceedingly startled by the bold proposition that, if any order made in any equity suit "on farther directions" is duly brought before your Lord-

*541 ships' House, all prior * decrees and orders in the suit, being brought up along with it, may be reviewed, varied, or revised, although the time for appealing against them had long elapsed, and that all objections may be taken to them which would have been available if they had been directly appealed against in due time. To this proposition I by no means assent and remembering that suits have been known to be pending in our Courts of equity for more than a century, we have only to contemplate the consequences to which such a doctrine would necessarily lead, to see that it is untenable. *De Burgh* v. *Clarke* [1] and *Attwood* v. *Small* [2] were cited as authorities, but by no means support such a doctrine; and I think that this "tacking" of decrees and orders must be confined to interlocutory orders, which are inoperative without a subsequent decree, and cannot extend to such a fundamental and independent decree as that of 1849, in *Lady Mornington* v. *Beavan*, which absolutely and finally determined the question of right between the parties.

The appellant is not now at liberty to contend that he may still appeal directly against the decree of 1849. In his petition, upon which this appeal is now heard, he prayed for leave to appeal against the decree of 1849, and upon reference to the Appeal Committee, this leave was refused. He has acquiesced in that decision of the Appeal Committee, and it cannot in this manner be impeached; if it could, the case of *Lambert* v. *Peyton* [3] would be no authority to show that, on the just construction of your Lordships' standing order of 1725, such an appeal would be competent.

I owe an apology to your Lordships for having occupied so much of your time in giving my opinion in this case; but I was *542 desirous of showing, as clearly as I could, that * the appellant has no reason to complain of being improperly prevented from bringing his case by appeal before your Lordships, and that, without injustice to others, the indulgence he seeks could not have been granted to him.

Sir Hugh Cairns excited my highest admiration by the learning and the talent he exhibited in his opening address, and, if possible, still more in his reply; but after the most deliberate consideration, I come to the conclusion that there is no ground for this appeal, and I must advise your Lordships that it be dismissed, with costs.

[1] 4 Clark & F. 562. [2] 6 Clark & F. 232, 309. [3] 7 H. L. Cas. 423.

LORD CRANWORTH. — My Lords, concurring as
ble and learned friend in the opinion he has just e.
my intention to add more than a very few words to

On the first point, the power of the Court of C
late, by general order, the time within which a
shall be enrolled, I was surprised to hear that an
raised. The authorities to which we were referr
torily that general orders on this subject were ma
ago, without any doubt or dispute of their vali
no such authorities could have been cited, I shou
that it was as competent to the Court to reg
within which this last step in a cause must be take
the time for completing any of the earlier stages.
that having had an opportunity of conversing wi
learned friend, Lord St. Leonards, on this subjec
thority for saying that he entertains no doubt u
In fact, the order of 1852 was made in conformi
order made by his Lordship in Ireland some
ously, when he held the Great Seal there; the
which order, though I believe it was not ver
there, was never doubted or called in question as

On the other question I shall only say, that I
and learned friend on my left exercised a wise
giving leave to enroll the decretal order of 185
against that order would not enable the appellant
original decree of 1849, the permission to enroll it
of no use to him.

If, as argued at your Lordships' bar, an appeal
of 1853 would, on the true construction of the
of this House, enable the appellant to bring int
original decree, though enrolled more than five
nounced nearly ten years before the appeal to thi
think, it would have been hard on the responde
facilities against her. If the enrolled decree w
erroneous view of the law, that was no fault of he
of limiting a time after which, for the repose
decision shall be questioned, would be entirely
merely showing that there has been, or probably
the party affected by the error shall be assisted
the bar of time. I entirely concur in the opinion

learned friend, the Lord Chancellor, that this appeal ought to be dismissed, with costs.

LORD WENSLEYDALE. — My Lords, I agree in the advice now given to your Lordships to dismiss the appeal; and I concur in the opinion expressed by the Lord Chancellor on the two questions arising in this case; viz., 1st, whether the general order of the Court of Chancery of the 7th August, 1852, as to the enrolment of decrees and orders, is valid; and 2d, whether the * 544 order of my noble and learned friend, the late * Lord Chancellor, ought to be reversed, as an improper exercise of the discretion vested in him by the order.

The effect of the general order of August, 1852, is without doubt practically to shorten the time of appeal allowed by the standing orders of the House of Lords, because, from the loose practice prevailing up to that time, the time for enrolling a decree, and consequently of appealing from it, was almost indefinite; and the most able argument of Sir Hugh Cairns at your Lordships' bar for a short time induced me to doubt whether the order of the Court of Chancery, not being made pursuant to an Act of Parliament, was not on that account *ultra vires* and void; but I am satisfied that it was not. The general order of the Court of Chancery was one to regulate its own procedure, and which that Court was perfectly competent to make; and the standing order of the House of Lords, making the time for appeals to run from the enrolment, left that Court perfectly at liberty to regulate the time for enrolment as it thought proper, with a view to its own proceedings. The circumstance that the alteration of the practice diminished the time for appealing is immaterial, as an alteration of practice would have been which had the effect of extending that time; and in effect the standing order of the House of Lords made the time variable and contingent upon the practice of the Court.

In the next place, I do not think that the order of the late Lord Chancellor can be set aside. I do not, indeed, share the doubt of my noble and learned friend on the Woolsack, as to the power of a Court of Appeal to set aside an order depending on the discretion of a Judge, when that discretion has been, in its opinion, improperly exercised; but, in this case, I entirely agree with my noble and learned friend, that it is not made out on the part of the appellant that the order was not perfectly right.

*I could have wished that some satisfactory ground *545 might be found to let in the appellant to appeal against the decree of the 21st July, 1849; for, from the full and elaborate discussion which took place before Lord Chancellor Cranworth, and the Lords Justices in the case of *Mornington* v. *Keane*,[1] the annuity payable to Lady Mornington would probably be decided not to be a prior charge to the mortgage of the appellant. However, I cannot but agree with my noble and learned friends, that the order of Lord Chelmsford cannot be impeached, and it is not now open to the appellant to question the former decrees.

LORD CHELMSFORD. — My Lords, two questions have been raised in this case: 1st. As to the power of the Court of Chancery to make the general order of August, 1852, limiting the time for the enrolment of decrees and orders. 2dly. As to the discretion exercised in refusing to permit the enrolment of the order upon farther directions of the 14th March, 1853.

As to the first point, it was contended that the power to make the general order could not exist, because, 1st, it was not given by statute; and 2dly, that it would not be within the inherent power of the Court of Chancery, as its effect is to limit the time of appealing to this House. I quite agree that the power to make the general order is not given by statute, but I think it is equally clear that it has not been taken away by such authority. The acts which have been referred to upon this point, the 3 & 4 Wm. 4, c. 94, and the 3 & 4 Vict. c. 94, empowering the Lord Chancellor, with the advice and assistance of the other equity Judges, to issue rules and regulations as to * the form of decrees and orders, *546 and as to the form and mode of drawing up, entering, and enrolling orders and decrees, were not requisite to enable the Court of Chancery to regulate these matters, for they were clearly within its competency as a part of its internal practice and procedure. And these Acts, therefore, could not exclude the exercise of any other power inherent in the Court.

It is said, however, that the general order in question imposes a limitation upon the right of appeal to this House, and that therefore it must be held to be *ultra vires* and void. No doubt if the order had attempted directly to restrict the right, or to shorten the

[1] 2 De G. & J. 292.

time of appealing, it could not have been maintained. But it may happen that an order of the Court, regulating its own proceedings, and therefore properly within its competency, may, although solely directed to this object, have an incidental bearing upon the rights of suitors with respect to some other, and even some higher tribunal. The power to make such order could not be affected by any such incidental consequences, at all events so far as respects the proceedings in the Court itself. Now this is the case with respect to an order as to the time within which decrees must be enrolled. Such an order is clearly matter of mere procedure, the mode of bringing the proceedings to a termination, to which the Court must have a power to affix some limit for the purpose of preventing all the inconveniences and mischiefs which necessarily arise from long delay.

To show that the general order of 1852 must have been made without reference to the right of appealing, your Lordships have been referred to instances of orders with respect to the time of enrolment of decrees which were made during periods when no appeal from the Court of Chancery lay to your Lordships' House.

And I think it can hardly be doubted that your Lordships' * 547 standing order * of the 24th March, 1725, was not made without reference to the existing practice of the Court of Chancery with reference to the enrolment of decrees. The rule upon this subject not having been strictly observed, it became at last a dead letter, although the form of asking leave to enroll at any distance of time was kept up, and continued down to the order of 1852. And thus the object of your Lordships' standing order, which was to prevent delay in appeals, by ordering that no petition of appeal should be received after two years from the signing and enrolling of the decree, was in many cases entirely frustrated. The general order of 1852, enforcing the enrolment of a decree within a limited time, from which the time of limitation in your Lordships' standing order begins to run, is, therefore, not opposed to, but is in unison with the object and intention of this standing order. I think that the general order is not only valid, but highly expedient.

The validity of the general order being established, it only remains to be considered whether the discretion which it gives to the Lord Chancellor was properly exercised upon the present occasion, by his refusal to permit the enrolment of the order upon

farther directions of 14th March, 1853. I will not notice the objection, that this was a question for the Lord Chancellor to determine, and that it was not the subject of an appeal, except to say that every Judge who is entrusted with the delicate and responsible power of discretion upon any occasion, ought always to desire that an opportunity should be afforded of bringing his judgment to the test of farther and more mature consideration. It is a great satisfaction to me that your Lordships have not declined to enter into this question, and that the opinions of my noble and learned friends justify the order which is the subject of the present appeal.

*It must be taken as fact, that Mr. Beavan had for many *548 years no intention of appealing against the decree of 1849, or against the order upon farther directions of 1853, and that he would not have attempted to appeal at all but for the judgment pronounced in the Court of Chancery in 1858, in the case of *Mornington* v. *Keane*. This he distinctly avows in his affidavit, upon which the application to enroll was founded; for he there says, "I am advised that by such decision, the aforesaid decision, made by the said decree in this cause, which gives priority to the said plaintiff over my said mortgage, has been overruled, and I have been advised to appeal to the House of Lords from the said decree and the said order on farther directions, and the said order of the 17th of July, 1855, which are respectively consequential on the said decree, as aforesaid."

Nor, even under these circumstances, would he have applied to enroll the order of 1853, unless he had supposed that an appeal against that order would have enabled him to draw down the decree of 1849, and make it also the subject of appeal. If this would have been the effect of an appeal against the order of 1853, I should still have thought it right, under the circumstances, to refuse the application to enroll; because the mere fact of a decision having taken place apparently at variance with the decree of 1849, in which the appellant had so long acquiesced, would not, in my judgment, have furnished a sufficient reason for granting an indulgence to him which could not have been conceded without seriously prejudicing the rights of Lady Mornington. But I cannot think, when a final decree has been pronounced (that is, final for all the substantial purposes of the suit), with liberty reserved for either party to apply to the Court, upon which an order upon

farther directions happens to be made, at whatever distance
* 549 of time * afterwards, that this will have the effect of reviving an appeal from the decree as to which the time for appealing had long before expired.

It is argued, however, that Mr. Beavan ought to have been let in to enroll, because he was absent from this country when the order on farther directions was made, and that he has been abroad ever since. If this question is to be determined by the general order alone, it must be observed that it contains no provision for disabilities, though, of course, absence in a foreign country would be a natural circumstance in the consideration of the justice and expediency of enlarging the period for enrolment. But there being no exemption in the general order, and it being quite clear that Mr. Beavan was cognizant of all the proceedings, appearing throughout the whole of them by counsel, he is not in a more favourable position for obtaining indulgence than any other suitor who remains within the jurisdiction of the Court.

But it is said that as the standing order of your Lordships' House contains an exception in favour of persons who are out of Great Britain and Ireland at the time of the enrolment of the decree, to refuse Mr. Beavan the permission to enroll is to deprive him of the benefit of this exception. It would be a sufficient answer to this complaint to say that the general order must be applied upon its own independent grounds without regard to collateral consequences. But it appears to me that in this particular case of absence from the country, the general order and the standing order correspond, and that even upon the order of 1853 the time had run against an appeal to your Lordships' House.

Your Lordships will observe that the standing order, after enumerating certain cases of disability in which the time for appealing is enlarged to two years after the removal of each
* 550 disability, singles out the particular case of * absence, and orders that in no case shall any person be allowed a longer time, on account of mere absence, to lodge an appeal, than five years from the date of the last decree. The standing order makes a clear distinction between enrolling a decree and the date of a decree, and appears to intend that five years from the time when the decree is made is to be the utmost limit of delay in the case of mere absence from the country. And it may be remarked that as any party may enroll a decree, there is no great hardship in bar-

ring the right to appeal after the lapse of so long a period as five years from the time of its being pronounced. If this is a correct interpretation of the standing order, then in November, 1858, the time for appealing against the order of March, 1853, had expired, and this House would not have received a petition of appeal against that order. But upon the other grounds I agree with my noble and learned friends that it was not just and expedient that the time for enrolling the order of 1853 should be enlarged, and that this appeal must therefore be dismissed.

Order affirmed, and appeal dismissed with costs.

Lords' Journals, 19th July, 1860.

SEED v. HIGGINS AND OTHERS.

1860. May 4, 5; July 19.

WILLIAM SEED, *Appellant.*[1]
JOHN HIGGINS and others, *Respondents.*

Patent. Specification. Disclaimer. Infringement. Evidence. Practice. Leave to Appeal. 17 & 18 *Vict. c.* 125.

Where the question of novelty or infringement depends merely on the construction of the specification, it is one entirely for the Judge; but where it also depends on other circumstances, such as the degree of difference, or of similitude between two machines, it is a mixed question of law and fact; what the jurymen find to have been done is the matter of fact; but the Judge must apply that fact according to the rules of law, and is entitled and bound to say whether what has been done amounts to an infringement.

The plaintiff took out a patent for an improvement in machinery used for roving cotton. His specification appeared to claim the discovery * of * 551 the application of the principle of centrifugal force for such a purpose, but he filed a disclaimer, declaring that he intended to claim only the application of centrifugal force in the particular manner described in the specification:

Held, that taking these two instruments together (*dub.* Lord Wensleydale), they sustained the patent.

The particular manner described was by the use of "a weight." The defendants

[1] Betts v. Menzies, 10 H. L. Cas. 132; Ralston v. Smith, 11 H. L. Cas. 233; Harwood v. Great Northern R. Co., 11 H. L. Cas. 663.

employed a machine similar in many respects, but, though using weight, or pressure occasioned by weight, as a force, not using "*a* weight:"—

Held, that this did not amount to an infringement of the plaintiff's patent; and that the Judge, on seeing this distinction, ought (*dub.* Lord Campbell, C.) so to have directed the jury.

On a trial for the infringement of a patent, the Judge declared his opinion that the specification and disclaimer were sufficient to sustain the patent, but he reserved that question for the Court. A verdict was given for the plaintiff. A rule to enter the verdict for the defendants was obtained, but was discharged. Leave to appeal was granted under the 17 & 18 Vict. c. 125, and the Court added to the leave, "and also on the ground that taking the specification and disclaimer to be good, there was no evidence to go to the jury of infringement." This second point had not been discussed in the Court below. The Court of Exchequer Chamber affirmed the judgment of the Court below on the question of the sufficiency of the specification and disclaimer, but directed a new trial, on the ground that there was no evidence of infringement to go to the jury:—

Held, that the Court of Exchequer Chamber had authority to grant a new trial.

The opinion of scientific witnesses as to whether there has or not been an infringement ought not to be received (*per* Lord Wensleydale).

THIS was an action brought by Seed to recover damages for the infringement of a patent, granted to him on the 14th July, 1846, for the invention of "certain improvements in machinery or apparatus for preparing, slubbing, and roving cotton, and other fibrous substances," which machinery he charged the defendant with having imitated. On the 23d August, 1854, the plaintiff filed a disclaimer, and the declaration alleged a breach of the patent right after that time.

* 552 *The defendants pleaded, first, not guilty; secondly, that the plaintiff was not the inventor; thirdly, that the invention was not new; fourthly, that the invention was not a manufacture; fifthly, that the specification was insufficient; sixthly, that the disclaimer extended the right originally claimed; seventhly, that the invention described in the altered specification was a different invention from that for which the patent was granted.

Issue was taken on all these pleas.

The important words in the first specification filed by the plaintiff were these: "My improvements in machinery or apparatus for preparing, slubbing, and roving cotton, and other fibrous substances, apply solely to that part of such machinery called the flyer, which is employed, in connexion with the spindle, for the purpose of winding the sliver or roving upon the bobbin. My in-

vention consists in the application of the principle of centrifugal force to the flyers employed in the above-mentioned machinery, for the purpose of producing the required elasticity or pressure upon the bobbin, by causing the small spur or lever, which conducts the sliver of cotton or other fibrous material on to the bobbin, to press or bear against the same simply by the action of such force, instead of being effected by springs or such other mechanical pressure. By the application of this invention the bobbins of rovings will not only be made hard, but equally compressed throughout, as the pressure upon the same will be found to decrease slightly as the diameter of the bobbin increases, and thus equalise the formation thereof, instead of having the outer or finished diameter made harder than the interior, which has hitherto been the case." The specification went on to describe the apparatus, and said that the upper end of the hollow flyer leg "has a small weight, *h*, attached thereto. As the flyer, *cc*, revolves at a high velocity, the * weight, *h*, at the upper end of the wire, will be thrown * 553 from the centre, and cause the spur or lever, *e*, at the lower end of the wire, to bear or press against the bobbin, *bb*, the pressure slightly decreasing as the increasing diameter of the bobbins causes the weight, *h*, to approach the centre of rotation." A drawing was attached to this description. The specification concluded thus: "The above apparatus represents one particular and practicable mode of applying my invention; but I would here remark, that I do not intend to confine myself to this particular method; but I claim as my invention the application of the law or principle of centrifugal force to the particular or special purpose above set forth, that is, to flyers used," &c., as before described.

The plaintiff afterwards, under the 5 & 6 Wm. 4, c. 83, and 15 & 16 Vict. c. 83, put in a disclaimer, which thus recites the reason for making it: "Whereas I have been advised that the claim of my invention, contained in the said specification, may be construed in such a manner as to be more extensive than I intended, and by reason thereof I am desirous of making and extending the disclaimer hereinafter expressed," &c. It then proceeded: "I disclaim all application of the law or principle of centrifugal force as being part of my said invention, or as being comprised in my claim of invention contained in the said specification, except only the application of centrifugal force by means of a weight acting upon a presser, so as to cause it to press against a bobbin, as

described in the said specification; and I declare that the above-written disclaimer is not intended to extend the exclusive right granted by the said letters-patent, and shall not extend the said right in any way whatever."

The cause was tried before Lord Campbell, at the sittings * 554 after Trinity term, 1857, when evidence was given * to show that the object of the plaintiff's invention was to produce a close and even winding of cotton on a bobbin, and that this was effected by a continuing pressure on the whole side of the bobbin, while the winding was going on. Among the witnesses called for the plaintiff were the following: Mr. Carpmael, after describing the two machines, said: "The similarity between that and Mr. Seed's is, that the weight is carried up the leg of the flyer; but the defendants do not carry the mean of the weight at the top; they make theirs weighty all the way up. Mr. Seed does not distribute his weight, but carries it to the top; the defendants carry it only part to the top, and distribute it all the way. I think that is not any substantial difference. It has the essential feature of Mr. Seed's, in carrying the weight from the bottom of the leg up the leg, and preventing the large excess of weight at the end of the leg which previously existed."

Mr. Charles May said: "The distinctive property of the plaintiff's presser consists in the application of the centrifugal tendency of the weight, that weight being supported at a higher point than the plane of rotation of the pressing finger. The defendants' presser so far resembles the plaintiff's in the peculiar distinctive quality of bringing the weight nearer to the source of motion; by bringing it higher up the leg there is less tendency to create that vibration which I believe was fatal to Dyer's presser. It gives the peculiar advantages of the plaintiff's in a great measure." In cross-examination he said that the weight in the defendants' machine was on the leg of the flyer; in the plaintiff's it was upon a separate piece of machinery,— upon a separate axis.

At the close of the plaintiff's case it was objected, first, that the disclaimer did, in fact, extend the claim, and described and * 555 claimed an invention different from that for * which the patent had been granted; secondly, that if the invention described in the specification, as altered by the disclaimer, was limited to the particular mode of applying centrifugal force described in the disclaimer, specification, and drawings, there was

no evidence of any infringement. These objections were overruled; but the point raised by the first was reserved. The second was not reserved, and the question of infringement was left to the jury. A verdict was found for the plaintiff.

In Michaelmas term, 1857, a rule was obtained to enter judgment for the defendants, on the ground that the disclaimer described a different invention than that for which the patent was granted, and that if the invention was confined to the particular mode of applying centrifugal force described in the specification, there was no evidence of infringement. In Hilary term, 1858, this rule was discharged.[1] The case was taken by appeal to the Exchequer Chamber, upon leave granted by the Court of Queen's Bench, under the 17 & 18 Vict. c. 125. The rule granted the leave, not only on the ground reserved at the trial, as to the construction of the specification and disclaimer, but "also on the ground that, taking the specification and disclaimer to be good, for the reasons mentioned in the judgment of the Court, there was no evidence to go to the jury of infringement." The patent was there held valid, but the majority of the Judges thinking that there was no evidence of infringement, a new trial was ordered.[2] Both parties appealed; the plaintiff, because he contended that the Exchequer Chamber had no authority to order a new trial on this new ground of misdirection; the defendants, because they insisted that the patent was not valid.

* *The Solicitor-General* (*Sir W. Atherton*) and *Mr. M.* *556 *Smith* (*Mr. Hindmarch* was with them) for the appellant,

Seed.— There was no jurisdiction in the Court of Exchequer Chamber to direct a new trial in this case. The leave granted under the 17 & 18 Vict. c. 125, §§ 33, 34, 35, could give no such authority. There can only be an appeal against what was decided in the Court below. The first rule was to enter a verdict for the defendants. That rule was discharged. The Exchequer Chamber, on appeal, confirmed that discharge, but discussed a new matter, and ordered a new trial upon it. This was not exercising an appellate, but an original jurisdiction; and there is nothing to warrant such a proceeding; and the power of appealing being a statutory power it must be strictly followed.

[1] 8 Ellis & B. 755.

[2] 8 Ellis & B. 771.

The original specification and the patent must be taken together, and they sufficiently set forth the nature of the invention, and the mode to carry it into effect, and constitute a good ground for a patent. The disclaimer does not claim any thing not claimed in the specification, but, on the contrary, limits what might have appeared to be a claim for every application of centrifugal force to a claim for the application of it in the manner, and for the purpose, described in the specification.

Assuming that the direction as to infringement may now be discussed, it is submitted that the question of infringement was properly left to the jury. That question depends on the testimony of witnesses, and not on the construction of instruments, and is a question for the jury, and not for the Judge; *Jupe* v. *Pratt*,[1] * 557 *De la Rue* v. *Dickenson*;[2] * so it was treated in *Bovill* v. *Keyworth*,[3] and in *Lister* v. *Leather*.[4] A patent for a combination does not import that each of the parts is new, nay, it is sufficient if the combination is new, though each of the parts may be old. Whether the combination is new is a question for the jury. In *Steiner* v. *Heald*,[5] though the obtaining of a colouring matter from madder was known almost as widely, perhaps, as the principle of centrifugal force, still the first application of a known process, the use of hot water with an acid, to a known material, spent madder, to produce what had never before been obtained in the same way, was left to the jury as sufficient to sustain a patent. *Hills* v. *The London Gas Company*[6] is an authority as to both these propositions.

The Lord Chancellor intimated that the respondents' counsel need not trouble themselves on the question respecting the jurisdiction of the Court in this case to direct the new trial.

Mr. Knowles and *Mr. Grove* (*Mr. Webster* was with them) for the respondents.—The specification and disclaimer will not support this patent. The specification was too wide. When the plaintiff framed it, he was plainly not aware that the principle of centrifugal force had ever before been applied to such a purpose. Yet it had been applied in Dyer's patent. A patentee must sum up in his specification the principle of his invention; if that principle is not new, the patent cannot be supported, although it appears

[1] 1 Webst. Pat. Cas. 144.
[2] 7 Ellis & B. 738.
[3] 7 Ellis & B. 725.
[4] 8 Ellis & B. 1004.
[5] 6 Exch. 607.
[6] 5 H. & N. 312.

that the application of the principle as described in the specification is new; *The King* v. *Cutler*;[1] for he must accurately
* describe his invention, so that men may know both what * 558
to do and what to avoid.

[THE LORD CHANCELLOR.—If there was a proper disclaimer of what he had no right to, would not the rest be valid?]

It might not, if the original specification had claimed as an invention a principle perfectly well known to every one; for then, the original being wholly void, no mere amendment, which a disclaimer is, could cure its defects.

Then, was the Court of Exchequer Chamber right in saying that there was evidence to go to the jury? To be able properly to answer that question, Dyer's patent ought to be here.

[THE LORD CHANCELLOR.—Is that part of the materials laid before the Court of Appeal? If not, it cannot be referred to.]

It is not part of the printed case, but it formed part of the evidence, for the witnesses referred to it, and made comparison with it, and that evidence is before the House.

[THE LORD CHANCELLOR.—Dyer's patent was only referred to with regard to novelty, but not with regard to infringement.]

But the two things are so blended together that it is impossible to separate them. Dyer's patent was gone, but if that patent contained what the plaintiff claimed as his invention, the use of the machinery in Dyer's patent could not be an infringement of the plaintiff's patent, for he could have no exclusive right in what was previously well known. A similar process applied to a purpose different from that which is the object of the patent will not constitute an infringement. In *Higgs* v. *Goodwin*[2] there was
a patent for treating chemically the sewage of towns, * by * 559
which a precipitate was obtained that was useful for agricultural purposes. The patentee used the hydrate of lime. The defendant, who represented the Board of Health for Hitchen in Hertfordshire, had separated a great part of the sewage matter from the water by filtration, and then applied hydrate of mercury, but did so not with the intention of turning the precipitate to value, but of getting rid of it. The jury thought that the defendant had infringed the plaintiff's patent, but the Court held that the intention was important, and, as the plaintiff had the intention to produce something which was commercially valuable, and the defendant did not interfere

[1] 1 Stark. 354. [2] Ellis, B. & E. 529.

with that purpose, but avoided it altogether, what he did was no infringement. In that case there was no doubt some question of fact for the jury, but that question of fact being ascertained, the question of infringement became one for the Court. So in *Barber* v. *Grace*,[1] the patent was for pressing woollen hosiery between heated boxes. The defendant introduced heated rollers instead of boxes, and it was held by the Court not to be an infringement. The new form was a new invention. So here anybody was at liberty to apply centrifugal force for the purpose of winding cotton, provided only that he did not apply it in the exact way described in the patent. In his disclaimer the plaintiff has not disclaimed the title or the means, but only the supposition that he claimed the application of centrifugal force to this purpose as his invention.

[LORD CHELMSFORD. — He disclaims all applications of that principle, except the application of it as particularly described in his specification.]

But his disclaimer is not there exact as it should be.

[THE LORD CHANCELLOR. — Suppose there to be six modes of applying centrifugal force: he first claims all six, then * 560 * finding that five of the six are in use, he disclaims all but one; may he not do so and have a valid patent?]

Saunders v. *Aston*,[2] *Morgan* v. *Seaward*,[3] *Neilson* v. *Harford*,[4] show that a misleading specification cannot sustain a patent. And such a doubtful disclaimer as the present will not cure it. The plaintiff's patent now depends on his disclaimer, and that does not fulfil the condition of showing men both what they are to do and what they are to avoid. A man cannot limit the disclaimer for the purpose of saving the novelty, and enlarge it for the purpose of saving the infringement. That has been done here. The evidence here shows that the defendants' machine was much more like Dyer's than the plaintiff's, and in fact disproves the pretence of infringement, and so the Judge ought to have decided on the construction of the patent, which is a matter only for the Court; *Neilson* v. *Harford*.[5] The jury ought to have been distinctly told that there was no evidence of infringement, and that the verdict must be for the defendants.

[1] 1 Exch. 339.
[2] 1 Webst. Pat. Cas. 75, n; afterwards in Banc., 3 B. & Ad. 881.
[3] 1 Webst. Pat. Cas. 173; 2 M. & W. 544, Murp. & Hurl. 55.
[4] 1 Webst. Pat. Cas. 320, 8 M. & W. 806. [5] 8 M. & W. 806.

July 19.

THE LORD CHANCELLOR (LORD CAMPBELL). — On the appeal by the defendants below against the plaintiff below, I am clearly of opinion that the judgment of the Court of Exchequer Chamber ought to be affirmed, for the reasons assigned in delivering the judgment of the Court of Queen's Bench, which was affirmed by the Court of Exchequer Chamber.

The other appeal, that of the plaintiff below against the defendants below, raises the question, whether at the conclusion * of the plaintiff's case, the presiding Judge ought to have * 561 directed a nonsuit, on the ground that although the novelty of the plaintiff's invention might be established, there was no evidence of infraction. This depended upon the examination of two scientific witnesses of great experience and respectability, who are much more familiar with such machinery than any Judge on the bench. They, after having described the plaintiff's machine and a machine of the defendants, manufactured and sold by them (which was the alleged piracy), swore as follows: "That there was not any substantial difference between them; that the defendants' presser so far resembled the plaintiff's in the peculiar distinctive quality of bringing the weight nearer to the source of motion, by bringing it higher up the leg, and by so bringing it higher up the leg there was less tendency to create that vibration which was fatal to Dyer's presser, and that this was the distinctive property and advantage of the plaintiff's presser, and that the defendants' gives the peculiar advantages of the plaintiff's in a great measure." Those witnesses may be considered as saying, that the defendants' machine sought to attain the same object as the plaintiff's, and substantially by the same process.

I must confess that I have still great difficulty in seeing, how, while these witnesses stood uncontradicted, the Judge could have at once withdrawn the case from the jury. Contradictory evidence was afterwards adduced by the defendants, but this could not strengthen the renewed application for a nonsuit. Where novelty or infringement depends merely on the construction of the specification, it is a pure question of law for the Judge; but where the consideration arises how far one machine, or a material part of one machine, imitates or resembles another in that which is the alleged invention, it generally becomes a mixed question of law and fact which must be left to the jury.

* 562 * In the present case, the plaintiff certainly was not entitled to a verdict without proving that the defendants had substantially used that particular mode of roving cotton to which his disclaimer confined him. No exception was taken to the manner in which the question was left to the jury. There might be a wrongful and actionable imitation of the plaintiff's machine, although it was not closely copied in all respects; and the degree of similitude or difference which is or is not to constitute piracy, seems, generally speaking, to savour more of fact than of law. In the present case, the difference chiefly relied upon was that the centrifugal force acts on a higher plane in the plaintiff's machine than in the defendants'. This was a very fit topic to be addressed to the jury, but I must very seriously doubt whether the Judge would have been justified in stopping the trial, by saying that there could be no infraction unless in both machines the centrifugal force acted exactly in the same plane.

However, notwithstanding these doubts, as I understand that my noble and learned friends, who heard this appeal argued at your Lordships' bar, agree in thinking that the judgment of the Court of Exchequer Chamber on this point was right, I have not so strong an opinion in the contrary direction as to force me to dissent, and I shall concur with them in advising your Lordships that upon both appeals the judgment be affirmed.

Lord Cranworth. — In this case, the Judges in the Exchequer Chamber directed a new trial, because, in their opinion, there was no evidence of infringement. The plaintiff has appealed, because he says there was evidence, and that, therefore, he ought to be allowed to maintain his action. The defendants have appealed, because they say the invention now relied on is not that for
* 563 which the patent was granted. * The Court of Queen's Bench, on the latter point, was unanimous in favour of the plaintiff, and a majority of the Judges in the Court of Exchequer Chamber concurred.

I adopt the same opinion. I think, reading the specification in a fair spirit, we must understand the patentee to have said, that he claimed as his invention the application of centrifugal force to the flyers in the mode elaborately explained in his diagrams. But then he did not confine himself to that mode; he claimed, farther, the application of the principle of centrifugal force to flyers used

in machinery for preparing and roving cotton, in whatever way it might be applied. The effect of the disclaimer was to strike out of the specification this latter general claim, leaving only the claim for the particular mode of application specially described. I think it would be unreasonable and hypercritical to say that on a specification so framed the patentee had not claimed as his invention, or as part of his invention, what he had described. And when, therefore, by the disclaimer the general claim is abandoned, the particular claim remains good. This disposes, therefore, of the cross appeal.

On the original appeal I think that the Court of Exchequer Chamber was right in holding that there was no evidence of infringement, and so that there must be a new trial.

By the disclaimer the right of the plaintiff was confined to the application of centrifugal force, by means of a weight acting on a presser, so as to cause it to press against a bobbin, a weight working in a plane above the rest of the machinery, as described in the specification. There was no evidence of the defendants having so applied centrifugal force. Their machine had no weight. The weight referred to in the specification is a distinct part of the machinery. The claim is not for the application of centrifugal * force by means of weight acting on a presser, but * 564 by means of *a* weight, and of a weight acting in the manner minutely described in the specification. This is not the case of an equivalent. What the defendants did, was to obtain the advantage of pressure by means of centrifugal force, obtained without a weight acting in the manner described by the plaintiff, and forming an essential part of his claim. If the machine of the defendants is an infringement of the plaintiff's patent, then he, in truth, retains the benefit of all which he has disclaimed. I am, therefore, of opinion that the judgment of the Exchequer Chamber was right, and so that both appeals ought to be dismissed.

Lord Wensleydale. — My Lords, there are two questions for your Lordships' decision in this case. The first, whether the defendants are entitled to have a rule to enter judgment for them on the point reserved. The second, whether, upon the evidence stated in the case agreed upon between the parties, there was any evidence to go to the jury of an infringement of the patent as limited by the disclaimer.

Upon the first question, which is, whether, after the disclaimer entered pursuant to the Statute 5 & 6 Wm. 4, c. 83, the patent was good for the particular machine described in the specification, I certainly have doubted. I have had a doubt whether the judgment of the Court below was right on this point, and that doubt is not altogether removed. I do not think this is the sort of case to which the statute was meant to apply. The patent is for every sort of application of the law or principle of centrifugal force to flyers used in machinery, or apparatus for slubbing and roving cotton, &c., and not for a particular machine or form of
* 565 doing this; and the disclaimer * is founded on a false suggestion (for false it certainly was) that the patentee's claim might be construed to be more extensive than he intended. That appears to me to be quite a fiction. It is now converted into a patent for a particular machine. But my doubt is by no means such as to induce me to dissent from the united opinions of the Judges of the Court of Queen's Bench, and the opinions of the majority of the Judges of the Court of Error, and, therefore, I agree that the judgment must be affirmed on the point reserved by Lord Campbell on the trial.

The other question is then to be considered, whether there was any evidence to go to the jury of the infringement of this patent right by the defendants. That this question is open, upon the rule pronounced by the Court of Queen's Bench, has already been decided by your Lordships. We may now assume that the patent was for the machine, described in the specification and drawings annexed, for the application of centrifugal force to the flyers employed in roving, and for that machine only; and the question is, whether it has been infringed by the defendants.

The question of infringement is one of mixed law and fact. The construction of the specification is for the Court, with the aid of such facts as are admissible, to explain written documents. In deciding whether there has been an infringement, there is a question of fact wholly for the jury, viz., what the defendants have done; and if scientific evidence is necessary fully to elucidate the case on either side, it is no doubt admissible, and in determining the question of infringement, the Judge must apply what the jurymen find to be true. This is generally done in summing up the case by the Judge, he leaving the necessary facts to the jury, and giving conditionally the necessary direc-

tions in point of law. The opinion of scientific * witnesses * 566 is only admissible as proof of facts. Their opinion as to whether there has been an infringement or not, though sometimes received, in order to save time and trouble, is, strictly speaking, inadmissible, and if objected to, ought to be rejected. The Court alone is to decide questions of law.

The question for your Lordships in this case is, simply, whether the facts proved by the witnesses, and set out in the case, were sufficient evidence which ought to have been left to the jury as proof of infringement by the defendants; that is, where they are such as, if the jury believed them to be true, would warrant the finding that there had been an infringement of this patent for the particular machine described in the specification.

I have come to the conclusion that the unanimous opinion of the Judges of the Exchequer Chamber on this question is correct, and that when all the evidence stated is considered, there was not sufficient to warrant the jury in finding that verdict, and that the plaintiff ought to have been nonsuited. The Court of Queen's Bench seems to have given too much effect to the opinions of Messrs. Carpmael and May. In this case, the models of both machines are brought before us, and would be before the jury; and judging from them we see for ourselves, that though they both answer the object of applying centrifugal force to the flyers, they do it in a different way. The plaintiff's wire is distinct from the flyers; he uses what is in common parlance a weight, and that weight is at the end of the perpendicular wire, at the top of it, and could not be put lower without interfering with the bobbin; the defendants do not use such a weight; they distribute weight by a sort of case round the bottom part of the flyer, the centre of gravity being lower than the middle of the flyer. The evidence of the scientific witnesses cannot * alter these * 567 facts, and their opinion that one machine is a piracy of the other is of no consequence whatever, for that is a question not in their province to decide. They prove, and indeed that is evident from the models, that in the plaintiff's the centrifugal force operates on a higher plane than in the defendants', and that in that respect the plaintiff's is a better invention than the defendants'. But that shows that the machines operate differently, though they both operate on the finger or presser by centrifugal force. If the claim in the patent had continued to be for any mode of applying

centrifugal force to the finger or presser, undoubtedly the defendants' machine would have been an infringement. But the disclaimer puts an end to that argument, and the patent being for a particular machine only, which clearly operates differently from that of the defendants, it seems, I own, to be very clear that one is not a piracy of the other. It is only by confounding the patent as it was with the patent as it is, that an infringement of the patent can be made out.

Therefore, I think that your Lordships ought to affirm the judgment, and that there should be a new trial.

LORD CHELMSFORD.—My Lords, there are two questions in these cases: first as to the validity of the disclaimer; second, as to the evidence of infringement.

Upon the first point, I am of opinion that the disclaimer did not extend the right granted by the letters-patent, nor did the specification, as altered by the disclaimer, describe another and a different invention from that for which the patent was granted.

The plaintiff, by his original specification, shows that he considered himself to be the first discoverer of the application of centrifugal force to that part of the machinery for roving * 568 * cotton by which the sliver or roving is wound upon the bobbin. But it is evident that the idea, which led to his taking out his letters-patent, was the application of the principle of centrifugal force to flyers, as embodied in the machine which is described in his specification and drawings. Acting, however, under the impression that he was the first discoverer of the application of the principle generally, he proceeds, after the description of his specific machine, to state that he does not intend to confine himself to the particular method represented, but that he claims as his invention "the application of the law or principle of centrifugal force to the particular or special purpose above set forth."

Now there may be some doubt whether, upon a claim so general, his patent would have been sustained; but at all events, if any person had previously applied centrifugal force in any manner to the flyers, for the purpose of winding the cotton on the bobbin, the letters-patent would have been void. The plaintiff, therefore, having probably heard of Dyer's patent, proceeded to enter a disclaimer. Assuming that the specification had been originally bad,

on account of the generality of the claim, I see nothing in the Act of Parliament which prevents such an objection as this being removed, the only limitation to a disclaimer of any part of the specification being that it shall not extend the exclusive right granted by the letters-patent. Whether the disclaimer in this case does extend the right must depend upon the construction of the original specification. Now, I do not understand the specification to claim, as the plaintiff's invention, the application of the law or principle of centrifugal force generally to flyers, and then to describe and exhibit the particular machine as an illustration of the mode in which that general principle might be carried into effect; but it appears to me, that the plaintiff first claims * the particular method described, and afterwards every other * 569 application of centrifugal force to the purpose set forth. Then, when he disclaims all application of the law or principle of centrifugal force, except only the application of centrifugal force as described in the specification, he does not abandon the whole of his invention, and leave himself nothing but an illustration of it; but he gives up all that is general, and limits himself to the particular method, which was a substantial and independent claim, to which the general claim had previously been superadded.

In this view the disclaimer certainly does not extend the right, nor can it be said to describe a different invention.

But the disclaimer, having thus narrowed the claim, and having fixed it to the precise and particular machine described, the question of infringement is brought to a very simple point. This question must necessarily be one of fact, because it depends upon something which has been done by the defendants, by which the plaintiff's right is alleged to have been invaded. But it may become a matter for the Judge to determine, not whether the acts have been done, but whether, upon proof of their having been done, the plaintiff has any case.

The mere production of the machine used by the defendants may satisfy the Judge that it is entirely different from the plaintiff's, and therefore that there is no evidence of infringement to go to the jury; and such, I think, ought to have been the view taken in this case. The nature of the plaintiff's invention is limited by the disclaimer to the application of centrifugal force by means of a weight acting upon a presser, so as to cause it to press against a bobbin, as described in the specification. Now, the weight men-

tioned in the specification, and shown in the drawing, is not only a substantial but an essential part of the machinery, and the mode of its application may be said to be the very *570 * machine itself. But the defendants' has no weight at all, in the sense of the plaintiff's specification. The scientific witnesses, indeed, say that the plaintiff's weight is carried up the leg of the flyer to the upper part, or, in other words, that it is placed at the top of the leg of the flyer, and that the defendants' weight is carried a little more than half-way up the leg; but this application of the term "weight" to the defendants' machine is really only an ingenious mode of establishing its resemblance to the plaintiff's. The defendants have no weight, properly so called, to come up or down the leg of the flyer, but use a vertical rod, consisting of a solid piece of metal, on the leg of the flyer, which itself constitutes the means of working the presser, and which is entirely different from the wire, with the upper end bent, and a small weight attached thereto, which is the plaintiff's invention. As the plaintiff is therefore confined by his disclaimer to the precise machine which he has described, and the machinery of the defendants is not similar to it, though producing the same result, the jury at the trial ought to have been told that there was no evidence of infringement; and the judgment of the Court of Exchequer Chamber is therefore right, and must be affirmed.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed.

Lords' Journals, 19th July, 1860.

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* JENKINS v. HUGHES. * 571

1860. June 11, 12; July 24.

JAMES GIDOIN JENKINS, *Appellant.*[1]
EDWARD HUGHES BALL HUGHES, *Respondent.*

Will. Estate for Life or in Tail. "Son." "Heir."

Whether a general intent, or a particular intent, expressed in a will is to prevail, must depend on the context of the whole will, in construing which words of a technical kind are not necessarily to receive a technical meaning.

A. had several great nephews: T., W., J., and J. G. His will was drawn up by himself while abroad. It contained the following passages: "I name and appoint my universal heir my great nephew T., eldest son of my nephew W., to whom I give all my lands, &c." "The eldest son of my godson and great nephew T., who may be living at his father's death, is always to be considered as heir to my estates." "If my godson and great nephew T. should not leave any son at his death, I direct that his next brother and second son of my nephew succeed to my estate and so on, in case of failure of male heirs to the third, fourth, &c." "The eldest great nephew living always to be considered as my legitimate heir in case of failure of the other brothers, my express will and desire being that my estates do always descend in the male line": —

Held, upon the true construction of the whole will, that the general intent was that the great nephew T. should take an estate in tail male, and that that intent must prevail.

THIS was an appeal from an order of the Master of the Rolls, allowing a general demurrer put in by the respondent to the appellant's bill. The question was, what was the true construction of the will of Thomas Jenkins, formerly of the city of Rome, esquire. The testator was the owner of considerable real estate in the county of Devon, and on the 15th September, 1797, being then resident at Rome, made his will as then by law required, for the devise of real estates. He first of all disposed of his plate, sculpture, pictures, gems, cameos, &c. Then he said, "the fine chimney in my sitting-room on the first floor of my house in Rome is likewise to be sent to my heir in England, * which * 572 I desire may be placed in the house he may destine for his residence, to remain to his heirs." He devised his lands to certain

[1] De Windt v. De Windt, Law Rep. 1 H. L. 88; Watkins v. Frederick, 11 H. L. Cas. 362.

trustees, whom he constituted his executors; of these Lord Clinton was the last survivor. He afterwards proceeded to make the following (among other) provisions, which have been numbered for convenience of reference:—

1. "I name and appoint my universal heir my great nephew Thomas Jenkins, eldest son of my nephew William, to whom I give all my lands and effects in Devonshire, in the kingdom of England, or elsewhere, be they lands, hereditaments, perpetuities, and every kind of effects whatsoever, named or not named, on the following conditions,—that he may not be put into possession of any of the said estates or effects until he arrives at the age of twenty-one years."

2. "I declare my said great nephew and godson Thomas Jenkins to be my universal heir."

4. "If my said great nephew Thomas should marry and have a child or children, if living at his death, I will and direct that my estates do descend to his eldest son, and if he has other legitimate children, that out of my said estates be paid, &c."

5. "It is always to be understood that if my great nephew Thomas should have more sons than one, if the eldest son should die before his father, he is to be succeeded by his second son, and so on to the third, &c."

6. "The eldest son of my godson Thomas, who may be living at his father's death, is always to be considered as heir to my estates."

7. "Should it happen that my said great nephew Thomas leaves no male child, to as many females, &c., the sum, &c."

8. "If my godson and great nephew Thomas should not
* 573 * leave any son at his death, I then direct that his next brother, and second son of my nephew William, succeed to my estate, and so on in case of failure of male heirs to the third, fourth, &c."

9. "The eldest great nephew living always is to be considered as my legitimate heir in case of failure of the other brothers, my express will and desire being that my estates do always descend in the male line."

10. "It is always to be understood, that in case my estates descend from one great nephew to another, the same conditions, as to the sum to be paid to such females as may be left, are to be observed to all whose father may die without heir male as is expressed in favour of the daughters of my great nephew Thomas."

11. "Should it happen that all the sons of my nephew William should die without leaving a son or sons, in such case my will is, that my estates do devolve, and be the property of my nephew Joseph Jenkins, son of my brother William, on the same conditions, relative to his heirs and descendants, male and female, as is expressed regarding my great nephew Thomas and his brothers; and if my said nephew Joseph should die without a legitimate son, I then direct and devise that my said estates descend to my nephew Thomas and his heirs, on the same conditions as expressed relative to his brother Joseph."

The testator died on 11th May, 1798, leaving all his nephews, William Jenkins, Joseph Jenkins, Thomas Jenkins, living at his death. This nephew William had six sons, of whom it is only necessary to mention four, Thomas, William, John, and James Gidoin.

In Michaelmas term, 1810, the testator's eldest great nephew Thomas, being then in possession of the estate, and assuming to be tenant in tail under the will, suffered * a recovery, and * 574 declared the uses thereof to himself and his heirs in fee simple. He conveyed one part of the estate to the present respondent who claimed under this title.

Thomas Jenkins died, 17th June, 1837, without any child. His next brother, William, then entered into possession; and while he was so possessed, his brother, the third great nephew, John, died, leaving a son. William died without male issue, 17th April, 1856; on which, the son of John and the present appellant, James Gidoin, the next great nephew, then living, put in their respective claims; after a time, the son of John conveyed all his interest to the appellant.

On the 16th February, 1858, the appellant filed his bill (which was afterwards amended) against the respondent and all other necessary parties, setting forth all the above facts, and prayed that the trusts of the testator's will might be carried into execution, and that the respondent might be decreed to account for the rents and profits of such parts of the testator's residuary real estates as were in his possession, and for farther relief. The respondent filed a general demurrer to the bill, and on the 8th July, 1858, the Master of the Rolls allowed the demurrer.[1]

The present appeal was then brought.

[1] 26 Beav. 108, nom. Jenkins v. Lord Clinton.

The *Attorney General* (*Sir R. Bethell*) and *Mr. Hanson* for the appellant.— Under this will, Thomas, the eldest grand-nephew, was not tenant in tail, and therefore had no power to suffer a recovery and sell the estate, but was merely tenant for life, with * 575 executory devises over; the scheme of the will being * that all the brothers, sons of the nephew, William, were to take in succession by way of executory devise, provided that no present possessor left any son living at his death. Secondly, admitting that the general rule, that an executory devise cannot be presumed when the words are capable of creating a remainder, is to be applied, then it is submitted that the will must stand thus: to Thomas, for life, remainder to his son living at his death. Then there will be a remainder on failure of that son to the brother of Thomas, in succession with like remainders to the persons answering the description of heirs male to such brothers; *Archer's Case*,[1] *Waker* v. *Snowe*;[2] and if these shall be regarded as contingent remainders, they will all be supported by the legal fee simple vested in the trustees. Throughout the will the intention is to give to such persons only as shall be the eldest son of the holder of the estate living at the death of that person; *Denn* v. *Bagshaw*.[3]

Nothing can be assumed from the word "descend," used in this will; it merely means "pass." The effect of the decision here is utterly to defeat the legacies.

[LORD KINGSDOWN.— Why may it not be an estate tail, subject to the charge of the legacies?]

There is no pecuniary charge before the estate tail, supposing it to be one, is created. The Master of the Rolls treated the general words as controlling and overruling all the antecedent definite expressions. That is an erroneous principle of construction; *Foord* v. *Foord*,[4] *Gallini* v. *Gallini*,[5] *Doe* d. *Burrin* v. *Charlton*.[6] * 576 * This must depend altogether on the greater force and clearness of expression of one intent or the other; *Towns* v. *Wentworth*;[7] and it is quite clear that no words can be struck out nor any introduced to give force to either the general or the particular intention. The words here are "if the eldest son" of

[1] 1 Rep. 63, *b*.
[2] Palm. 359, Fearne (9th ed.) 151.
[3] 6 T. R. 512.
[4] 3 Brown, P. C. 124.
[5] 5 B. & Ad. 621, affd. 3 A. & E. 340.
[6] 1 Scott, N. R. 290, 1 Man. & G. 429.
[7] 11 Moore, P. C. 526.

Thomas "should die before his second son." These words cannot give an estate tail to Thomas; the words cannot be read as if they were "die without leaving issue male." Son cannot here have such an interpretation. If all the sons and grandsons of William die, the estates go, not to the grand-nephew, but to the nephew, Joseph, which is quite a different mode of dealing with them. That shows that what is in technical propriety described by the word "descend" was a matter not strictly intended in this will. The word "son" has here its ordinary meaning, and the word "heir" is here used in the sense of devisee. The sons of the great nephew, in fact, take as purchasers; and if any estate tail is created, it is created in them and not in the great nephews themselves. The particular words in this will which give a life estate are not governed by the general words.

This case seems to be decided by that of *Chamberlayne* v. *Chamberlayne*,[1] where, in a devise strongly resembling the present, the two Courts of Queen's Bench and Exchequer Chamber refused to let the words "heir male" control the word "son." The words heir male, used in the general provision, cannot therefore be allowed to control the word sons in the particular clause giving the estate over. But if son is to receive the meaning of heir male, then the son of John must be entitled, and the direction in this will with respect to William, must be considered * with * 577 reference to all that follows, and therefore, though John died before William, as he left a son, that son is entitled to the estate.

The argument that a part of the will may be contravened if a particular construction is not given, though not entirely to be disregarded, is not to be taken as conclusive; for a devisor having a particular intent may forget general expressions used by him in another part of the will, and unless the particular intent is plainly controverted by the general intent, it must prevail. Here this particular intent, which is plainly expressed, is not to be controlled and overruled by some general and perhaps vague expressions used elsewhere.

It was suggested in the Court below, that the construction of this very will had been previously decided in other suits; but there seems to be great doubt as to whether those suits were adverse, or

[1] 6 Ellis & B. 625.

only instituted to obtain the opinion of the Court upon the title;[1] what was really done in those cases is not known, for there are no reports of the first two decisions, and a report of a third in Maddock is controverted.[2] At all events, those decisions are not binding on this appellant.

[1] Sugd. Law of Prop. 257, n.

[2] See Sugd. Law of Prop. 257, and Sugd. V. and P. 13th ed. 325, n. The two cases are spoken of in the first of these books, but the name of the case before Sir T. Plumer is not given. It is Jenkins *v.* Gould, Register's book, 10th December, 1813. The decree recites that a case was sent to the Court of King's Bench with the question, "what estate the plaintiff took under the will of T. J., the testator;" that, after fully hearing counsel, that Court certified that "the petitioner took an estate tail," and then goes on to say, that the Court of Chancery ordered "the certificate to be confirmed, and that the agreement for the sale ought to be specifically performed," and decreed accordingly, and gave the usual directions for conveyance. There does not appear to have been any appeal against this claim. In the second suit the parties were Jenkins *v.* Herries. There the case was heard on exceptions to the Master's report (4 Madd. 67), and it is incorrectly stated (as noticed, 6 Sim. 168, n.) that there was a decree for specific performance. The order is "Exceptions overruled, deposit to be returned," Reg. Bk. (11th February, 1819), p. 464. From what afterwards occurred in the House of Lords, for it was made the subject of appeal, it appears that the order of the Vice-Chancellor must have been merely signed by the Lord Chancellor and enrolled, and the first petition of appeal (nom. Herries *v.* Jenkins) having represented it to have been confirmed by the Lord Chancellor, there is a petition to amend the first petition by declaring it to have been signed and enrolled, which petition was allowed (Lords' Journals, 1823). It then appears that after the hearing, for (Law of Property, 256, n.) Lord St. Leonards says that he argued for the respondent, and "cited all the cases," an objection must have been taken that the order appealed against was not one which, in form, could be treated as the subject of a decision on appeal; and so the entry in the Journals of the 14th February, 1823, is, "that the said appeal do stand over until the case has been heard on farther directions in the Court below, with liberty to the parties then to appeal to the House as they may think fit." Lords' Journals, 1823, p. 517.

In this way, the appeal seems to have been suspended for a whole year, and then arranged; for, on the 13th February, 1824, the case again appears, and this entry is made: "Upon reading the petition of Robert Herries, esquire, appellant in a case depending in this House, to which Thomas Jenkins, esquire, and others are respondents; setting forth, 'that the petitioner and the respondents having amicably arranged the matters in difference between them, and having agreed that the appeal should be withdrawn without costs, the petitioner therefore humbly prays that he may be at liberty to withdraw his petition of appeal without costs accordingly,' the agent for the respondents having signed the petition, as consenting thereto;" and he was allowed to withdraw it. These various entries in the Journals show the case to have been one which was contested, and not one in which a contract was set up in order to obtain a judgment on the title before the actual

* *Mr. Rolt* and *Mr. Lloyd* (*Mr. Fooks* was with them) * 578
for the respondent. — First, There can be no construction which will give the estate to the second great nephew while there is male * issue of the first great nephew living; * 579
and secondly, any construction which gives the estate at all to the male issue of the first great nephew must give an estate tail. The question is really reduced to this: is the word son to give way to the word heir, or the word heir to the word son? That must be determined by the general context of the will; the will shows that the testator used these words at different times to indicate the same thing. That which Mr. Justice Holroyd said must be done in *Mellish* v. *Mellish*,[1] must be done here; the word son in this will should be read any son. There the words were less clear and distinct than in this will, but the general intent being undoubted, the devisee was held to take an estate tail. Technical words are to have their legal effect, unless from other words used in the same will it is shown to have been the clear intention of the testator that they should not have it; and again, where there is a general scheme in the will, and a particular scheme which is inconsistent with the general scheme, or falls short of it, the general scheme shall prevail. *Jesson* v. *Wright*,[2] *Fetherston* v. *Fetherston*,[3] *Roddy* v. *Fitzgerald*.[4] These rules are distinctly adopted by Lord St. Leonards,[5] who mentions also *Montgomery* v. *Montgomery*,[6] and *Robinson* v. *Robinson*.[7] Hence the failure of the first great nephew meant the failure of that man and his son living at his death, and on that failure alone will the estate go over. The testator indicates clearly his intention by the use of the word "descend."

* Inconvenience and uncertainty do furnish a strong * 580
ground for construing a will so as to prevent them here;
if only a life estate with executory devises has been created, the last clause is void for remoteness.

It is not by any means clear that the estates are not given subject to the legacies and portions, nor can it be asserted that to

sale; for there are more references to the Appeal Committee, and those too upon strict points of form, than would have occurred in any amicable suit.

[1] 2 B. & C. 520, 534.
[2] 2 Bligh, 1, 50.
[3] 3 Clark & F. 67.
[4] 6 H. L. Cas. 823.
[5] Sugd. Law of Prop. 250.
[6] 3 Jones & L. 47, 8 Irish Eq. 740.
[7] 1 Burr. 38.

give to the will the construction contended for by the respondent, could defeat those legacies or portions.

The argument on the other side is, that the word son must be read strictly male heir, and yet that the male heir is still only a purchaser. But *Chamberlayne* v. *Chamberlayne* [1] is not an authority for that general proposition; it only shows that the words "heir male of the body" may, when used in a particular manner, describe a purchaser. And for the same reason, *Archer's Case* [2] has no bearing on the present. Nor is *Towns* v. *Wentworth* [3] an authority for the proposition for which it was cited, for in that case there was a regular series of limitations providing for the son and the sons of a son, and then a gift over, by which all the children already provided for took an estate tail, and there the Court determined to mould the language of the testator so as to carry his general intention into effect. And the same had been the principle of the decision in *Foord* v. *Foord*,[4] for there all the purposes indicated by the general intention of the testator could be carried into effect by giving an estate for life. And *Ellicombe* v. *Gompertz* [5] shows that referential construction will be employed not to defeat, but to promote the general intention of the testator manifested on the face of the will; and for that purpose * 581 Lord Chancellor Cottenham * held [6] that he might "put a restricted sense on the words of the gift over." In earlier cases the same construction had been put upon the words "issue male of his body." *The Attorney-General* v. *Sutton*,[7] and it was adopted by this House in *Candy* v. *Campbell*.[8] The general intention here is clear, and it is that which must govern the decision of the case.

The Attorney-General in reply.—The first words of this will give to the first great nephew an estate in fee; so that, looking to the general intent of the testator, as first expressed, it is opposed to the construction contended for by the respondent. Those words can only be controlled by words showing a different and at least an equally clear intention. Such controlling words are not to be found here. The ordinary descent, by way of remainder, could

[1] 6 Ellis & B. 625.
[2] 1 Rep. 63, *b*.
[3] 11 Moore, P. C. 526.
[4] 3 Brown, P. C. 124.
[5] 3 Mylne & C. 127.
[6] 3 Mylne & C. 154.
[7] 1 P. Wms. 754, 3 Brown, P. C. 75.
[8] 2 Clark & F. 421.

not have been contemplated, for no son was to take except one alive at the death of his father, the holder of the estate. And, again, the eldest son living at the death of the father might not be that father's male heir. The words are, in fact, words descriptive of a man who is to take by purchase. If words cannot be understood by themselves, they must be construed by the aid of those which accompany them, and that is a referential construction, which in this will is wholly in favour of the appellant. There is nothing here to enlarge the express gift to A. into a gift to his issue; his son living at his death would take only as a purchaser. The subsequent words are merely words of description. In *Chamberlayne* v. *Chamberlayne* it was held impossible to reduce *the estate to an estate tail by force of the gift over, because the words used had reference only to persons living at the death of the possessor of the estate. * 582

July 24.

THE LORD CHANCELLOR (LORD CAMPBELL). — This is a suit in which the plaintiff prays that the trusts of a testator's will may be carried into effect, and that the respondent may be decreed to account for the rents and profits of so much of the testator's residuary real estate in the county of Devon as are now in the respondent's possession. The question of whether the respondent has purchased these parts of the testator's estate on a good title all depends upon the true construction of the will of Thomas Jenkins, dated 15th September, 1797, a short time before his death; and the great question is, whether, under this will, the testator's godson and great nephew, Thomas Jenkins, took an estate tail in the estates, the subject of this agreement of sale. If he did, it is admitted that this estate tail having been bound by a recovery, the objection to the title is removed, and the defendant must retain the decree pronounced in his favour.

Upon this very title there are judicial decisions which, although we are by no means bound by them, we ought to consider. The first of these was in the case of *Jenkins* v. *Gould*, in the year 1812, when there being a suit in the Court of Chancery by the testator's great nephew, Thomas Jenkins himself, for the specific performance of an agreement to sell another part of the same estates, depending on the same title, a case stating the same will, and the same facts on which we have now to determine, was sent for the

opinion of the Judges of the Court of King's Bench, who then were Lord Ellenborough, Mr. Justice Le Blanc, Mr. Justice * 583 Bayley, and Mr. Justice Dampier. They, according * to the practice then subsisting, without giving their reasons, certified to the Court of Chancery that the case "has been argued before us; we have considered it, and are of opinion that the plaintiff took an estate tail under the will of the said Thomas Jenkins, the testator, in the lands devised to him." The cause coming on again before Sir Thomas Plumer, then the Vice-Chancellor, on farther directions, he, after hearing counsel on both sides, ordered that the certificate be confirmed, and decreed a specific performance, with costs to be paid by the defendant to the plaintiff, the Master to settle the conveyance if the parties differed. An attempt is now made to deny or weaken the authority of this decision, on a suggestion that the suit was not adverse, and that the object of the parties was to obtain the opinion of the Court as to the title. I do not see that this fact is by any means clearly made out; but if it was, I do not think that it would detract from the authority of this decision, for the statement of the case was full and accurate; it was argued by counsel of eminence, both in the Court of Chancery and the Court of King's Bench, and in both Courts the judgment was deliberately given by very able and conscientious Judges.

The next decision on this question was in *Jenkins* v. *Herries*, in the year 1819, when the case was fully reported by Mr. Maddock.[1] That likewise was a suit for the specific performance of an agreement for the sale of another part of the same estates, when upon the same will the very same question arose. It was elaborately argued before Sir John Leach, then Vice-Chancellor, by four learned counsel, among whom Mr. Preston was on one side, and Mr. Sugden, now Lord St. Leonards, on the other. * 584 The Vice-Chancellor, after commenting upon and * overruling the objections urged to the position, that the testator's great nephew, Thomas, took an estate tail, concurred in that position, and decreed a specific performance.[2] There was an appeal to this House against that decree, and great weight has been attempted to be attached to the circumstance that, although the appeal was argued at your Lordships' bar, no judgment was given

[1] 4 Madd. 67.

[2] See ante 577, n.

upon it. But, upon referring to the Journals, we find that the House declined then to give judgment upon a supposed informality in the Court below, which had not, in form, decreed specific performance, but had merely overruled an exception to the Master's report upon the title. There seems, however, no reason to believe that the decree was disapproved of, either by Lord Eldon or Lord Redesdale, before whom the appeal was argued.

These decisions upon the title are not binding upon persons subsequently becoming interested, and we must treat the question as if it was *res integra*. But, after a very attentive consideration of this will and of the arguments on both sides, and after referring to the numerous authorities brought before us, I have come to the clear conclusion that *Jenkins* v. *Gould* and *Jenkins* v. *Herries* were properly decided.

There are words in the will which, taken by themselves, are sufficient to give a fee simple to Thomas Jenkins, the great nephew, on which an executory devise over might have been limited. But there are other subsequent words in the will which I think clearly cut down the fee simple to an estate tail. During the argument there were some observations as to the possibility of cutting it down to an estate for life, the son taking as a purchaser. But this point was not very seriously contended for, and * it * 585 seems to me hardly to be arguable. The real question is whether Thomas, the great nephew, did take a fee with executory devises over, or took an estate tail.

Looking to this will, I think it not only discloses a general intent that Thomas, the great nephew, should take an estate tail, but it contains specific limitations, which can only be carried into effect by an estate tail being taken. The testator says in the sixth clause of the will, "The eldest son of my godson, Thomas" (meaning Thomas, the great nephew), "who may be living at his father's death, is always to be considered as heir to my estates;" and in the ninth clause, "The eldest great nephew living is to be considered as my legitimate heir in case of failure of the other brothers, my express will and decree being, that my estates do always descend in the male line." These words clearly indicate an intention that the great nephew, Thomas, should take an estate tail, so that his eldest son should always be considered as heir to the testator's estates, and that there should be remainders in tail male to the other great nephews.

The only serious objection to this construction seems to me to arise from the words "who may be living at the time of his father's death," which taken literally would exclude the son of an eldest son who had pre-deceased his father. But this cannot be considered an express intention to exclude from the succession the son of a deceased eldest son; and I say with Sir John Leach,[1] "It is plain that the devisor did not intend that his estate should go over, from the family of one great nephew to another, unless upon the general failure of issue male of his first great nephew.

It is plain that it was his intention not to exclude, but to
* 586 include, the sons of sons who should die * living their
father;" and therefore that "I am bound to conclude that he did not refer to the possible contingency of sons dying in the lifetime of their father and leaving sons, not because he meant to exclude such sons, but because that contingency did not happen to occur to him."

By the construction which has been put upon this will, all the expressed intentions of the testator may be carried into effect without contravening any intention which can reasonably be supposed to have been entertained. To carry into effect the expressed intentions of a testator, an estate tail may be considered as given to the first taker, although there may be words in the will which, by themselves, would give an estate for life, or would give only an estate for life, or would give a fee simple. In this case it would be against a well-settled rule for construing wills, if, instead of holding that the great nephew, Thomas Jenkins, took an estate in tail male, with remainders in tail male to the other great nephews, we were to hold that he took a fee simple with executory devises over.

In construing such a will as this, made by an artist long domiciled in Rome, evidently without professional assistance, but with a recollection of some terms of English conveyancing, the meaning of which he very imperfectly understood, it is admitted that all the words he used cannot remove their technical interpretation, and that we are to try to get at the intention by looking at the whole will and ascertaining the sense in which each word is used by this testator, according to its collocation in the will. In such a task what assistance can we have from travelling through a long series of preceding decisions upon wills, and seeing what meaning has

[1] 4 Madd. 81, 82.

been given to each particular disputed word in other wills with a totally different collocation? The meaning put by Courts of justice upon technical words, which the testator is presumed to employ in * their legal sense, can be of little service in * 587 construing the same words in a will which the context clearly shows the testator used in a different sense. This testator, by his promiscuous use of the word son and the word heir, shows beyond all question that he had no notion of the legal sense to be put upon the one word or the other, and that when he used the word "descend" he had no notion of the distinction between taking by descent and taking by purchase. I abstain, therefore, from commenting upon *Chamberlayne* v. *Chamberlayne*, *Millish* v. *Millish*, and the other cases relied upon in the very able argument of the counsel for the appellants.

Construing this will according to the well-established principles for the construction of such a will, I am of opinion that the testator's grand-nephew, Thomas Jenkins, took an estate tail in the lands devised; and this being so, it becomes unnecessary to consider the question which would have arisen as to the plaintiff's title, and his right to a decree in his favour, if his claim had not been barred by a valid recovery.

I must, therefore, advise your Lordships that the appeal be dismissed with costs.

LORD CRANWORTH.—My Lords, the question for decision is, whether Thomas, the eldest great nephew of the testator, took an estate in tail male or an estate in fee simple, with an executory devise over in the event of his having no son living at his death. There are several clauses in the will, some favouring one of these constructions, some the other. The task imposed on us is to decide which view of the case is to prevail.

There is no doubt but that under the first two clauses of the will Thomas would have taken an estate in fee simple. * No other meaning can be given to the words of the testa- * 588 tor appointing his great nephew and godson, Thomas Jenkins, to be his universal heir. The third clause does not affect the present question; but the next three, the fourth, fifth, and sixth, are important. By the fourth clause, the testator proceeds thus: "If my said great nephew Thomas should marry, and have a child, or children, if living at his death, I will and direct that

my estates do descend to his eldest son," with a pecuniary provision for other children, if any. The appellant contends that the effect of this clause is to carry over the estate by way of executory devise to the eldest son of Thomas, the devisee, if living at his decease. The respondent, on the other hand, contends that it merely cuts down the previous fee simple to an estate tail. It is useless to speculate as to what would have been the effect of this clause if the will had ended with it. There are several clauses following it, with which it must be read in connection before we can decide as to its true construction. The fifth clause is in these words: "It is always to be understood, that if my great nephew, Thomas, should have more sons than one, if the eldest son should die before his father, he is to be succeeded by his second son, and so on to the third, &c." The sixth clause is, "The eldest son of my godson Thomas, who may be living at his father's death, is always to be considered as heir to my estates." Whatever doubt might have existed as to the meaning of the will, if it had ended with the fourth clause, there can be no doubt but that, coupling what had gone before with the passages I have last read, namely, the fifth and sixth clauses, and supposing the will to have stopped there, the eldest son of Thomas living at his death, would have succeeded to the estates by virtue of an executory devise in his favour. The result of such a construction is, it is true, to * 589 exclude the sons of * sons who may have pre-deceased their father, and so to let in a younger in preference to an elder male line. It is difficult to suppose that this could have been what the testator intended; but, as has often been said in modern times, a testator has a right to be capricious. He may have had motives unknown to us; and, after all, our duty is not to explore what was passing in his mind, but to ascertain the meaning of the words he has used.

The subsequent clauses of the will relate to the event which has happened, namely, the death of the eldest great nephew, Thomas, without leaving a son. The seventh clause makes provision for daughters in that event, and the eighth clause proceeds as follows: "If my godson and great nephew, Thomas, should not leave any son at his death, I then direct that his next brother and second son of my nephew, William, succeed to my estate, and so on, in case of failure of heirs male, to the third, fourth, &c." This clause raises a doubt as to whether the strict interpretation of the former

passages in the will could have been that which was really intended. The former branch of the clause would be consistent with the literal interpretation of what had gone before, for it gives the estate to the second great nephew only in the event of Thomas, the eldest great nephew, not leaving a son at his death; but the latter part of the clause carries the estate over from the second to the third great nephew; not (in terms at least) in the event of the second dying without leaving a son at his death, but in case of failure of heirs male of the second.

Primâ facie this limitation would give to the second and all subsequent great nephews an estate in tail male; but, on the part of the appellant, it was argued that the words, "in case of failure of male heirs," must be read referentially, as if the words had been in case of failure of * a son living at his death, * 590 i. e. in case of failure of any person standing towards William, the second great nephew, in the same relation as the person to succeed to Thomas was to have stood under the previous clauses of the will, and who had been previously described as heir to the estates. There would, I think, be great difficulty in adopting such a construction, even if there was nothing afterwards to throw light upon it, for the word is not heir, but heirs. The estate is not to go over from the second to the third great nephew on failure of a male heir of the second, but on failure of male heirs, which is strong to show that a continuous line of male heirs was contemplated. And if this was to be the principle of succession from the second to the third, and so on to all the other great nephews, it is fair to suppose that a similar course of devolution was contemplated in the transmission of the estate from the eldest to the second great nephew. There were seven great nephews, all under age, and there is nothing to indicate an intention in the testator to deal with any one of them in a manner different from that in which he dealt with the others, except only by always preferring the eldest.

The circumstance, therefore, that the eighth clause will, according at all events to one construction of it, vest in the second and all the younger great nephews an estate in tail male, would, even if the will had stopped there, give rise to great doubts; first, whether the same estate was not supposed to have been given to Thomas, the eldest great nephew, by the fourth clause where the testator directs that the estates should descend to the eldest son of

Thomas, and next, whether that was not intended to give to Thomas an estate descendible to all his male descendants; and, if so, then whether the two following clauses could be recon- * 591 ciled with what had gone before, by * supposing that the testator used the words son and eldest son, as including, not only the son himself, but all his male issue; or, if this could not be done, then whether these two clauses might be rejected, as being irreconcilable with what, from the other clauses, appeared to be the intention of the testator.

How this might have been if the will had not gone beyond the eighth clause I need not inquire, because I think that the next (the ninth) clause is decisive. That clause is in these words: "The eldest great nephew living always is to be considered as my legitimate heir, in case of failure of the other brothers, my express will and desire being that my estates do always descend in the male line."

The expression "in case of failure of the other brothers" is equivocal. The more natural interpretation of the word "failure" in this place, even looking only to what had gone before, seems to me to be to treat it as meaning failure of issue male; but the words might bear the construction in case of any brother dying without leaving a son living at his death, i. e. they might possibly be so construed, looking only to what had gone before. But the words which follow seem to me to remove all doubt. The testator expressly declares his will to be, that his estates should always descend in the male line. This object can only be effected by holding that Thomas and every other great nephew took estates in tail male, in succession one after the other.

When a testator directs that his estates shall always descend in the male line, he directs that they shall go in a course of succession well understood, and in strict conformity with the usual course of settlements. That such a direction has been given by this testator is certain; and, as this course of succession is inconsistent with a direction that a younger son should take to * 592 the exclusion of the * son of a deceased elder son, I think we must suppose that when, in the previous clauses, the testator speaks of the second son succeeding in the event of the elder son dying in his father's lifetime, he really referred to the case of an elder son dying without a son, or rather, without male issue; that he considered the word son as extending to the son's son *in*

infinitum. On no other hypothesis can the clearly expressed intention, that the estates should always descend in the male line, be carried into effect.

This will was evidently framed by a person little aware of the precise effect of its different clauses. The testator appears to have been an English artist, resident at Rome, and probably he had no professional aid in the preparation of his will; the consequence is, that many of the clauses are very inartificially framed. But the general emphatic direction contained in the ninth clause seems to me to justify us in holding the true construction of the will to be, that Thomas took an estate in tail male.

This construction would cause the estates to go in a convenient mode, and a mode usually adopted in this country, as being conformable to our social habits; and though Courts of justice have no right to interfere with the most capricious limitations of property, when it is clear that such limitations have been made, and are such as the law allows, yet if the language used in a will admits of two constructions, according to one of which property will go in a convenient and ordinary course of succession, and according to another in a capricious and inconvenient course, Courts of justice may reasonably lean towards the former as what was probably intended.

I have not yet referred to the argument of the Attorney-General, that if it should be held that estates tail are created, they ought to be estates tail in the sons of the great nephews themselves, not in the great nephews. This view * of the case was not * 593 pressed with much confidence. In truth, it is evidently untenable. I have searched in vain for any words which could possibly be held to give estates for life to the great nephews, with remainder to their first and other sons in tail. The existence of estates tail is deduced mainly from the express language of the ninth clause, which evidently contemplates inheritable estates in the great nephews themselves, and not life interests in them, with remainder to their male issue. I accede to the argument of the Attorney-General, that an estate for life cannot be enlarged to an estate tail by connecting it with a gift on failure of issue living at a particular time, as it may by connecting it with a gift to a failure of issue generally. But here the estate tail does not arise from any reference to the previous gifts to the sons, but from the other language to which I have referred.

Nor do I quarrel with the manner in which the Attorney-General propounded the general doctrine as to what has been called the referential construction, where benefits have been given to such members of a class as shall answer a particular description; as, for instance, to children attaining twenty-one, or children living at a particular time, and afterwards there is a gift over on failure of the class. The Court may, if the context requires it, consider the failure contemplated to have been a failure, not of the class generally, but of that portion of it to whom the benefits had previously been given. This was the principle of the decision in *Ellicombe v. Gompertz.*[1] But it is inapplicable here. There is no rule which says that such a construction must be adopted in all cases; and to hold that the failure of male heirs mentioned in the eighth clause must refer to a great nephew dying without leaving a son * 594 * living at his death, would, in my opinion, defeat the manifest intention of the testator apparent from the other clauses of the will.

I have, on these grounds, satisfied myself that Thomas, the eldest great nephew, took an estate in tail male; and in coming to this conclusion, it is satisfactory to me to know that I not only concur with the Master of the Rolls, whose decision is now under review, but also with two former decisions on this same will, one by the Court of King's Bench when Lord Ellenborough presided there, and the other by Sir John Leach, when he was Vice-Chancellor.

Lord Kingsdown.—My Lords, I entirely concur in the view of this case which has been expressed by my noble and learned friends.

Order affirmed, and appeal dismissed with costs.

Lords' Journals, 24th July, 1860.

[1] 3 Mylne & C. 127.

JEFFRIES AND OTHERS v. ALEXANDER AND OTHERS, AND THE ATTORNEY-GENERAL.

1860. March 22, 23; May 10; July 6, 30.

JAMES JEFFRIES and others, ... *Appellants.*
JOHN BIDDLE ALEXANDER and others, and THE ATTORNEY-GENERAL, ... } *Respondents.*[1]

Deed. Will. Charity. Personalty. 9 *Geo.* 2, *c.* 36. *Real Object of Mortmain Act.*

A. being possessed of some pure personalty, but of considerable property in mortgages, executed some years before his death an indenture, by which, declaring a wish to found certain charities, he covenanted to pay, or that if he did not pay during his lifetime, his executors should, within twelve months after his death, subject to his debts and legacies, pay to certain persons therein named the sum of 60,000*l.*, to be invested in their names on the trusts thereby declared; the trusts were charitable trusts. This deed was never enrolled in Chancery. On the same day he made a will giving certain legacies, and appointing executors, most of whom were the persons named in the deed. These papers were never communicated by him to anybody. Just before his death he caused * the papers to be produced from his drawers, and * 595 handed them to the persons attending his death-bed. They were tied up with a memorandum which declared that they had been prepared in that form, under advice, to save the legacy duties, and in order that if probate duty was paid in the first instance it might be got back again in consequence of the covenant creating a debt to be paid out of the assets: —

Held, that the indenture was a deed and not a testamentary paper: But,

Held also, that so far as realty was to be affected it was void within the Statute of Mortmain, 9 Geo. 2, c. 36. *Diss.* Lords Cranworth and Wensleydale.

Observations as to the object of the Statute of Mortmain.

The costs were ordered to come out of the estate.

The Attorney-General v. Jones (3 Price, 368) questioned.

THE appellants were three of the next of kin of Benjamin Brame, late of Ipswich, deceased, and the questions on this appeal were whether a certain indenture, dated the 12th of August, 1846, and hereinafter set forth, was not altogether void, and whether the sum of 60,000*l.*, thereby covenanted to be paid to the respondents upon trusts for certain charitable uses, was payable out of such

[1] Fisher v. Brierley, 10 H. L. Cas. 163.

parts of the estate and effects of the said Benjamin Brame as could not be lawfully devised or bequeathed for charitable purposes.

On the 12th August, 1846, Benjamin Brame who was seised of some real estate, and possessed of personal estate of considerable value, consisting in great part of money secured upon land, executed two indentures, and his last will and testament, all dated on that day.

One of the two indentures, called "The Charity Foundation Deed," was expressed to be made between Benjamin Brame of the one part, and the respondents of the other part; but it was executed only by him, and not by them. It was (so far as material) in the words and figures following: —

* 596 * "This indenture, made the 12th day of August, A. D. 1846, between Benjamin Brame, of Ipswich, in the county of Suffolk, gentleman; of the one part, and William Henry Alexander, of Ipswich, aforesaid, banker, Frederick Alexander, of the same place, banker, and George Alexander, of the same place, banker, of the other part. Whereas the said Benjamin Brame is desirous of founding the three charities hereinafter mentioned, for certain poor belonging to, and residing in, the several parishes in the borough of Ipswich, in the county of Suffolk, and for this purpose desires to settle and assure a part of his personal estate upon the trusts and for the purposes hereinafter expressed or declared and contained, of and concerning the same: Now this indenture witnesseth, that, in pursuance of the said desire of the said Benjamin Brame in this behalf, he for himself, &c., doth by these presents covenant, promise, and agree, with and to the said William Henry Alexander, Frederick Alexander, and George Alexander, jointly and severally, &c., that he, Brame, shall and will in his lifetime, and within the space of twelve calendar months next after the day of the date of these presents, lay out and invest at interest the sum of 60,000*l.* of lawful money of Great Britain, in the names of Jeremiah Head, of Ipswich, aforesaid, gentleman; John Biddle Alexander, of the same place, banker; Simon Batley Jackaman, of the same place, gentleman; and the said William Henry Alexander; or in the names or name of the survivors, &c., in the Government or Parliamentary Stocks or Funds of Great Britain, called the 3*l.* per Centum Consolidated Annuities; or in case the said Benjamin Brame shall not in his

lifetime lay out and invest the said sum of 60,000*l.*, as aforesaid, that then the executors or administrators of the said Benjamin Brame, within the space of twelve calendar months next after his decease, and subject and without prejudice to * the * 597 payment or discharge, by, with, or out of the estate of the said Benjamin Brame, of all the funeral and testamentary expenses and other debts of the said Benjamin Brame, and the legacies (if any) given or bequeathed, or hereafter to be given or bequeathed, by his will, or any codicil or codicils thereto, and of all annuities (if any) given, bequeathed, or settled, or hereafter to be given, bequeathed, or settled, by the said Benjamin Brame, by his will, or any codicil or codicils thereto, or by any deed or deeds, instrument or instruments, in writing under his hand and seal, do and shall lay out and invest at interest the sum of 60,000*l.* of lawful money of Great Britain, in the names of the said Jeremiah Head, John Biddle Alexander, Simon Batley Jackaman, and William Henry Alexander, or of the survivors or survivor of them, or of the executors or administrators of such survivor, in the said Parliamentary Stock or Fund of Great Britain, called the 3*l.* per Centum Consolidated Annuities, to and for the end, intent, and purpose, that the said 3*l.* per Centum Consolidated Annuities, so to be purchased as aforesaid, shall and may henceforth be held or possessed upon the trusts, and for the purposes hereinafter expressed or declared, and contained of and concerning the same." And Head, J. B. Alexander, Jackaman, and W. H. Alexander and the survivors, &c., and the trustees for the time being of the said three per cents. and of all other funds, securities, and estate, were to be possessed thereof for the purposes of the charitable uses and trusts thereinafter declared, and of the dividends, interest, and yearly produce of all and singular the said three per cents. and trust estate "upon the trusts, for the purposes, and subject to the powers, provisos, declarations, and agreements thereinafter expressed or declared, and contained of and concerning the same * (that is to say)." Then came the declar- * 598 ation of the trusts, all of which were for the benefit of the poor of Ipswich.

The other of the two indentures so executed by Benjamin Brame, which was called "The Legacy and Annuity Deed," was also dated the 12th of August, 1846, and purported to be made between

Benjamin Brame of the one part, and certain other persons of the other part; but like the first, it was executed by Brame alone.

This deed was executed for the purpose of providing small legacies and annuities for individuals of the testator's family and household, and covenanted for their payment by his executors within twelve months after his decease.

The will of Benjamin Brame was made on the same day as the deeds. By that will he gave numerous small legacies to various individuals and existing charities: "All which charitable legacies I direct shall be paid out of such part only of my personal estate as shall not consist of chattels real for the purposes of the said charitable institutions." And he nominated Head, J. B. Alexander, and Jackaman his executors; and he went on thus: "I also give and devise all my mortgage and trust estates to the said J. Head, J. B. Alexander, S. B. Jackaman, and their heirs, upon the trusts to which the same may be subject."

Brame afterwards made a codicil to his will, which codicil bore date the 20th of November, 1848, by which he revoked the appointment of Head as one of his executors, and substituted in place of that person, as executor, T. B. Ross: "And I hereby direct and appoint that the said Thomas Baldock Ross shall be a trustee with the other trustees in the execution and management of the charitable trusts created by a deed executed by me for that purpose."

* 599 * Benjamin Brame died 21st July, 1851, and on the same day a paper parcel, which he described to the persons attending his death-bed, was found in the bureau in the room adjoining to that in which he died, and upon it was written in his handwriting: — "Enclosed are the two deeds respecting the disposition of my property; and my will; 12th August, 1846." The parcel, upon being untied, was found to contain the two deeds, and the will and codicil, and also a paper writing or memorandum in the following words: —

"It will be seen that the drafts of the two deeds of covenant are prepared by Mr. Ram. There will not be so much as 60,000*l.* to invest, — I calculate about 50,000*l.*; but he recommended a larger sum to be invested than there would be of the assets, which would carry the principal monies after the annuities had ceased, as also the residue (if any), over and above what I have given by

will. The object of the deeds of covenant was to save the large sum which would otherwise have had to be paid for legacy duties; and it is apprehended that if any part had to pay probate duty in the first instance, that the duty might be got back again in consequence of the deeds of covenant creating a debt to be paid out of the assets. Mr. Ram considered that although the covenant is to place out in the 3*l.* per cents. a sufficient sum to pay the annuities, yet there would be no objection to let a sufficient sum remain of the mortgages for those purposes, for which better interest would be obtained than buying into the funds. It is my wish that Jemima Segger, my late servant, and Joseph Pursey, may be placed as recipients for the 7*s.* a week. — B. B., 11th August, 1846."

The testator retained all these papers in his own possession, from the time when he executed the same up to the time of his death, and never communicated the contents of any one of them to any person whatever.

* The Charity Foundation Deed was not enrolled in Chan- * 600
cery pursuant to the Statute of the 9 Geo. 2, c. 36.

The will and codicil were proved by Alexander and Ross, on the 11th of September, 1851, in the Prerogative Court, Jackaman having first duly renounced probate.

The testator died seised of some freehold estate, and entitled to personal estate, not specifically bequeathed by his will, to the amount of 79,954*l.* 17*s.* 9*d.*, of which the sum of 74,790*l.* consisted of money secured upon land; the sum of 7027*l.* 19*s.* 10*d.* constituted the amount payable as legacies and annuities.

On 31st December, 1851, the respondents, J. B. Alexander and T. B. Ross, filed their bill against the appellants and others (the Attorney-General afterwards voluntarily intervened in the suit), by which it was prayed that the two deeds might be declared valid, and all proper directions given.

The several defendants put in their answers thereto, and the appellants, the next of kin of the testator, submitted that the alleged deeds of covenant were inoperative as deeds. Witnesses were examined, and the cause came on to be heard before the Master of the Rolls on the 21st February, 1853, when, upon hearing counsel for all the parties to the suit, and also Her Majesty's Attorney-General, who voluntarily appeared on behalf of the Crown, by a decree of that date his Honor directed an inquiry who

were the next of kin of the testator, and what the estate consisted of at the death. And it was ordered that the necessary accounts should be taken, and that the testator's personal estate, not specifically bequeathed, should be applied in payment of his debts and funeral expenses in a due course of administration, except the alleged debt created by the deeds of covenant, and then in
* 601 payment of the legacies * bequeathed by the said will and codicil. And leave to apply was reserved.

The chief clerk certified that the personal estate of the testator, not specially bequeathed, consisted chiefly of money secured on mortgages.

The causes came on to be heard on farther consideration on the 17th day of July, 1854, and his Honor, by his decree of that date (amongst other things) declared that the "Legacy and Annuity Deed" was valid, and that the same created a debt against the estate of the testator for the several sums of money therein covenanted to be respectively paid and invested. And it was ordered that the trustees under the "Charity Foundation Deed" should bring an action in the Court of Queen's Bench on the covenants therein contained, and that the next of kin should be at liberty to defend the same.[1] The appellants appealed against this decree. Their appeal came on to be heard before the Lords Justices, assisted by Mr. Justice Wightman and Mr. Justice Erle, on the 31st day of July, 1855, when their Lordships were pleased to order that the decree of the Master of the Rolls, dated the 17th day of July, 1854, should be varied by striking out so much thereof as directed the trustees to proceed to a trial at law, and should stand as follows: "The Court doth declare that the indenture of the 12th day of August, 1846, is valid, and that the sum of 60,000*l.* is payable out of the assets of the said Benjamin Brame, subject to the payment of the funeral and testamentary expenses, and debts and legacies, and the sums directed to be paid by the said other indenture of the same day." And the action at law was stayed. And the costs of all parties were ordered to be costs in the cause.[2] The present appeal was brought against this order.

* 602 * *Mr. Rolt* and *Mr. Elmsley* (*Mr. Speed* was with them) for the appellants. — First. The deed creating the charity is testamentary, and its validity is to be determined by the law

[1] Alexander *v.* Brame, 19 Beav. 436. [2] 7 De G., M. & G. 525.

testamentary. Secondly. In the administration of assets, this sum of 60,000*l.* is a legacy, and subject to all the incidents of one. But, thirdly, if the disposition is not testamentary, nor the sum itself a legacy, it is a gift of land, or a charge upon land, within the meaning of the 9 Geo. 2, c. 36, but has not been made and enrolled according to the provisions of that statute, and the deed is an ineffectual attempt to evade those provisions, and is void.

A benefit to which the individual intended to be benefited cannot be entitled till after the death of the donor, is a testamentary benfit. Here it was so. There could be no enforcement of this covenant, for there need be no breach of it in the lifetime of the testator. There was no communication of this deed to any one whatever, and the testator had the same power of revocation over it as if in creating it he had expressly reserved such a power. In every thing but form, therefore, this deed was a will. The only condition that can be enforced is against the executors, twelve months after the death of the testator, and even then they are not required to pay absolutely or immediately, but only after satisfying debts and legacies. In *Doe* d. *Garnons* v. *Knight*,[1] it is said that a deed so executed takes effect from the date of execution; but the doctrine there must be taken with reference to the facts of that case, according to which there was actual delivery of the deed, for, on executing it, the testator said to the attesting witness, "Here, keep this; it belongs to Mr. Garnons." Nothing of that sort was done here. All the * circumstances here * 603 must be taken together, and they show that Brame had the fixed intention of retaining, up to the time of his death, the power of revoking the deed; so that, whatever was its form, it could have no operation but as a will; *Naldred* v. *Gilham*.[2]

[LORD WENSLEYDALE referred to *Attorney-General* v. *Jones*,[3] and *Tompson* v. *Browne*,[4] which questioned it.]

The second and third questions may be treated together. In the administration of assets in equity this is a legacy. Equity will look to the circumstances, and to the condition of the instrument. There is here no consideration for the supposed debt, the subject of the covenant, and it is postponed to the payment of debts and legacies. Under such circumstances equity will not be bound by the mere form of a seal being attached to the instru-

[1] 5 B. & C. 671.
[2] 1 P. Wms. 577.
[3] 3 Price, 368.
[4] 3 Mylne & K. 32.

ment, but will examine the real nature of the transaction; *Fairebeard* v. *Bowers*,[1] where a voluntary judgment, payable three months after the death of the giver, was postponed to his simple contract debts. In such a case, equity will restrain the holder of the voluntary judgment, upon the application of the simple contract creditor.

Then what was the object of the 9 Geo. 2, c. 36?[2] That is shown by the words in the preamble. Its main object was not, as Lord Justice Turner supposed, to "prevent the inalienability of land;" it was to restrain persons from disinheriting
* 604 those who came after them, they themselves * having enjoyed their property to the last moment of their own lives. The Act did not absolutely prevent the gift of land in charity, but it required that gift to be made in the lifetime of the donor, and with certain forms. Unless these are observed, equity will not recognise any gift of land, nor the gift of a charge on land; *Rolleston* v. *Morton*,[3] *Collinson* v. *Pater*.[4] Nor will the Court marshal assets in favour of a charitable bequest; *Cherry* v. *Mott*.[5]

Again, this was, in substance, a devise of a mortgage, and that is expressly within the 9 Geo. 2, c. 36; *The Attorney-General* v. *The Earl of Winchilsea*,[6] *Sorresby* v. *Hollins*,[7] *Attorney-General* v. *Meyrick*;[8] for money due on mortgage is a charge on land. In *Attorney-General* v. *Weymouth*,[9] the scheme was resorted to of directing land to be sold, and the residue of the money, after payment of debts, was given to a charity; this was held to be void under the statute. Lord Hardwicke then clearly and fully explained the object of the Mortmain Act. He said, that to construe the Act as intended only to restrain the disposition of the land, so as to make it inalienable, was erroneous; "The reason of this statute was to hinder gifts by dying persons, out of a pretended

[1] 2 Vern. 202, Prec. in Ch. 17.

[2] In the course of the discussion upon this point, it was suggested that the title of the Act might be considered. Two noble Lords appeared to differ on this matter. Lord Cranworth then observed that "though the question as to the title of an Act was put from the Chair in the House of Commons it was never put in this House." In The Attorney-General *v.* Weymouth (Ambl. 22), Lord Hardwicke expressly says, "the title is no part of the Act."

[3] 1 Drury & W. 171–195.

[4] 2 Russ. & M. 344.

[5] 1 Mylne & C. 123, 131.

[6] 3 Brown, Ch. 373.

[7] 9 Mod. (8vo. ed.) 221.

[8] 2 Vez. Sen. 44.

[9] Ambl. 20.

or mistaken notion of religion, as thinking it might be for the benefit of their souls to give their lands to charities, which they paid no regard to in their lifetime; and therefore the Act of Parliament has not absolutely prohibited the disposition of land to charitable uses, but left it to be done by deed, executed a year before the death of the grantor, and enrolled within six months after execution, though this will render land equally unalienable; but the Legislature * blended the two incon- * 605 veniences together." His Lordship had acted on this principle in *Arnold* v. *Chapman*,[1] where this evasion was adopted: the testator devised 100*l.* to persons whom he made his executors, and a copyhold estate to C., on his paying the testator's executors 1000*l.* after payment of debts and legacies, and the residue was to go to the Foundling Hospital; Lord Hardwicke held, that this gift of 1000*l.* was, in reality, a charge on the land for a charity, and was void under the Mortmain Act. *Curtis* v. *Hutton*[2] and *Attorney-General* v. *Tyndall*[3] are to the same effect.

[LORD WENSLEYDALE. — Suppose the testator had bequeathed a debt due to him from A. B., that debt might require to be levied from the real as well as the personal assets of A. B.]

There can be no inquiry as to the funds out of which a debtor is to pay a creditor; *March* v. *The Attorney-General*,[4] *Foone* v. *Blount*;[5] but that is entirely different from a bequest payable out of the funds of the testator. The admission made in the Court below, that this is a deed which "creates an obligation to be performed by the covenantor, or by his executors after his death," with power to him "in the meantime to dispose of his estate, both real and personal, as effectually as he could if the deed had never been executed," really puts an end to the case, for it brings the case within the very mischief sought to be remedied by the statute. It may be true that such a scheme as this is not, in terms, forbidden by the statute, for no statute can foresee, and provide against, all the efforts of ingenuity, but it is forbidden in * principle, and is in substance a violation of the provisions * 606 of the statute.

The true nature of this gift is also shown by the proceedings, which must be adopted in order to enforce it. If an action was

[1] 1 Ves. Jun. 108.
[2] 14 Ves. 537.
[3] 2 Eden, 207, Ambl. 614.
[4] 5 Beav. 433.
[5] Cowp. 464, Ambl. 320, 767.

brought by the trustees after the death of the testator, and judgment obtained, and the personal assets were insufficient to satisfy it, recourse must be had to the real assets; but the statute would not permit that. Suppose, again, that the testator was seised only of real estate, a judgment creditor would have, in contemplation of equity, an equitable estate in the land; but equity would not allow land to be sold to satisfy such a demand as this. That principle has been applied in the case of the usury laws. A person lent money on usurious interest; he took a warrant of attorney, and entered up judgment on it. The debtor sold the land, and the usurious creditor came into equity and sought to render the judgment available against the proceeds; but equity, looking at the real nature of the transaction, would not permit that. *Lane* v. *Horlock*.[1] The decision in this House[2] leaves untouched this part of the Vice-Chancellor's judgment. *Bond* v. *Bell*[3] proceeds on the same principle. The debt was good, the judgment was good, but when the judgment came to be enforced against the land, equity refused its assistance. Then that puts an end to the claim here on the ground of contract. The instrument on which the judgment is founded may be valid in itself, and may be enforceable at law; but when land is to be affected by it, and the claim under the circumstances cannot be satisfied without land being * 607 affected, equity will inquire into all * the circumstances, and will prevent the judgment from taking effect. *Foone* v. *Blount*[4] does not apply to show that this judgment may be enforced, for that was the case of a personal disability attaching to the creditor only; but where, as in the case of *The Attorney-General* v. *Weymouth*,[5] the disability affected the person making the devise, equity treated it very differently. *Rust* v. *Cooper*[6] recognised and applied the same principle in bankruptcy.

The Attorney-General (*Sir R. Lethell*), with whom was *Mr. Wickens*, for the Attorney-General.—Two points have been presented for consideration in this case: first, that the gift is in substance testamentary; secondly, but if not testamentary, if it is an interest arising under contract, then that the contract is a device to evade the statute, and is void. Farther, it is insisted that,

[1] 1 Drewry, 587–613.
[2] 5 H. L. Cas. 580.
[3] 4 Drewry, 157.
[4] Cowp. 464.
[5] Ambl. 20.
[6] Cowp. 629.

admitting the instrument to be valid, yet, under the administration of the assets real, it cannot be enforced. In the Court below, no doubt was entertained that the instrument was a deed.

[THE LORD CHANCELLOR. — Do you say that it could operate both as a deed and a will ?]

No; whatever matter is operated on by the contract at once passes. In arguing on the operation of the statute, the other side has forgotten the great distinction between things resulting from the act of the party, and things resulting from the operation of law. Yet *Doe* d. *Mitchinson* v. *Carter*[1] has presented that distinction in a marked point of view, and the true principle is clearly stated in *Croft* v. *Lumley*,[2] where all the cases are collected. The result * of the legal operation of a judgment is not to be considered * 608 as a thing done by the contract of the party.

[THE LORD CHANCELLOR. — That is, without express evidence of intention ?]

Yes; a warrant of attorney which puts in operation legal machinery, the result of which operation is a charge upon land, is not to be treated as itself a charge. There is the distinction between the act and the *intuitus*. The rule is, that where the thing prohibited is the result of the rule of law following on the act of the party, but is not the act of the party himself, it is no violation of the prohibition. The supposed policy of the law and the tendency of acts are not guides for the construction of a statute. The principle is correctly given in the head-note to *Philpott* v. *St. George's Hospital*.[3] The devise there not being brought within the words of the statute, it was held good.

The Mortmain Act is a statute in restraint of the natural right of a man to declare what shall become of his property after his death, and is to be strictly construed. It did not intend to prevent the superstitious use of property.

[THE LORD CHANCELLOR. — So that pure personalty alone is used.]

That is so. Nor did it strike at contracts. It affected only voluntary dispositions of land. A charity might contract for the purchase of land. Nothing was touched but a mere gift of land, or of an interest in land or of money to be applied to the purchase of land, or of a sum of money charged upon land. This contract does not come within any one of those descriptions. The only appearance of

[1] 8 T. R. 57, 300. [2] 6 H. L. Cas. 672. [3] 6 H. L. Cas. 338.

difficulty here arises from the distribution of assets. Suppose
* 609 the assets to be enough to pay the debts * but not the legacies, it would be put as a debt. A voluntary settlement in favour of the testator's natural children was so treated in *Fletcher* v. *Fletcher*;[1] and *Ward* v. *Audland*[2] shows how such an instrument as this is regarded in equity. *Tufnell* v. *Constable*[3] proves that it would be established at law. The rule stated on the other side applies to the payment of legacies but not to payment of debts. When the Court comes to distribute the property of the testator in the payment of legacies it may consider whether they are gifts prohibited by statute. But, as in *Fletcher* v. *Fletcher*, where it is more than a mere legacy, all that is said is, that it is a sum payable out of the assets of the testator. The only question that can then arise is, whether the assets are legal or equitable assets. An action on a covenant of the testator is not brought against any particular portion of his property. There is not a word in this covenant to create a lien, a charge, or an incumbrance on land, or any thing savouring of the nature of land; and if the contract itself is free from objection, a result of a particular mode of enforcing it cannot make it objectionable. Had the judgment here been against the testator in his lifetime, that would not have affected specifically any particular lands.

[THE LORD CHANCELLOR. — It would have been a lien on all his lands.]

But that would have been a lien given by statute, not by the act of the party. *The Attorney-General* v. *Weymouth*[4] does not apply, for that was a direct gift of the produce of a sale of land. So was *The Attorney-General* v. *Meyrick*,[5] that being an express gift of the money due on mortgage securities. In *Myers* v.
* 610 * *Perigal*,[6] a bequest of shares in a joint stock bank, the assets of which were by the deed to be deemed personal estate, though in fact the property of the bank consisted of freehold and copyhold and money on mortgages of freeholds, was treated as not being within the Mortmain Act. And the same point was held in *Edwards* v. *Hall*,[7] though there the company was incorporated, and the Act of incorporation did not contain

[1] 4 Hare, 67.
[2] 8 Beav. 201.
[3] 7 A. & E. 798.
[4] Ambl. 20.
[5] 2 Vez. Sen. 44.
[6] 16 Sim. 533, 2 De G., M. & G. 599.
[7] 6 De G., M. & G. 74.

any clause making the shares personal estate. In *Linley* v. *Taylor*,[1] a bequest of shares in one railway company, which was leased to another company for one thousand years, was held not to be within the Mortmain Act; and *Hayter* v. *Tucker*[2] applied the same rule to shares in a mine which was worked upon the cost book principle. In *Ashton* v. *Langdale*,[3] though mortgages of tolls in a railway undertaking were held to be an interest in land, and as such coming within the Mortmain Act, railway debentures and canal shares were declared not to be so. *Thornton* v. *Kempson*[4] applies this principle of distinction as to the nature of the fund, and *Foone* v. *Blount*[5] was the case of a Roman Catholic taking a benefit upon a judgment which could only be satisfied out of real estate. To be void under the statute the gift must come within its very words, as in *Roper* v. *Radcliffe*.[6] Where it is not so, as in *Du Hourmelin* v. *Sheldon*,[7] the statute will not prevent the gift taking effect. That was a devise of land in trust to sell, and after paying off mortgages to invest in the funds * for the benefit of * 611 aliens, and it was held that the Crown was not entitled to either the lands or the funds.

Mr. Roundell Palmer, with whom were *Mr. Lloyd*, *Mr. Follett*, *Mr. Surrage*, *Mr. Rodwell*, and *Mr. Greenside*, for the several charities. — The first two documents are deeds, and do not constitute a will. A direct test of this is, that they could not be admitted to probate. They both contain a positive obligation without any power of revocation. The third instrument is a will, and is so declared on the face of it. The covenant that the executors shall pay after his death does not make the first two instruments in any degree testamentary. That is the case with many marriage settlements, and the persons entitled under such instruments are specialty creditors; *Logan* v. *Wienholt*.[8] That principle had been previously adopted in *Jones* v. *Martin*.[9] The covenants here would take effect without probate, and the sums secured are debts. They

[1] 1 Giff. 67.
[2] 4 Kay & J., 243.
[3] 4 De G. & S. 402.
[4] Kay, 592.
[5] Cowp. 464. See Foone v. Pinkard, Ambl. 320, and the decree made by Lord Bathurst, C., upon the certificate sent from the King's Bench, Ambl. 767.
[6] 9 Mod. 167–181; 10 Mod. 89, 230; Cited 2 P. Wms. 5; 5 Bro. P. C. (8vo.) 360.
[7] 1 Beav. 79.
[8] 1 Clark & F. 611.
[9] 3 Anst. 882, 6 Bro. P. C. 437, 5 Ves. 266, n.

would be specialty debts, but in the administration of assets would not prevail over debts for value. *Jenkins* v. *Bryant*,[1] *Boughton* v. *Boughton*,[2] showed that such deeds were valid as against the donor, and that he himself could not destroy their effect by a devise made subsequently. The case of *The Attorney-General* v. *Jones*[3] is never cited without disapprobation, and may therefore be disregarded.

As to the Mortmain Act, the principles which govern a case like the present are to be found in *Philpott* v. *St. George's Hospital*,[4] where it was declared that that Act was a prohibitory and * 612 not a penal statute; and where the * declaration previously made in *Edwards* v. *Hall*,[5] that any one might evade the statute so that he placed himself in such a position as not to come within its provisions, was in substance adopted. *Croft* v. *Lumley*[6] proceeded on that principle in the construction of covenants in an agreement supposed to be affected by 1 & 2 Vict. c. 110.

[THE LORD CHANCELLOR. — Could this testator have expected that this investment could take place without the sale of the mortgages?]

Perhaps not, but that is immaterial in construing this deed. *May* v. *Roper*[7] and *Briggs* v. *Chamberlain*[8] show that the proceeds of real estate will pass by a deed under the Fines and Recoveries Act, and *Tuer* v. *Turner*[9] adopted those decisions.

It is a fallacy to try to raise a distinction between cases under the statute on the ground that some relate only to the incapacity of certain persons to give, and others only to the incapacity of other persons to take. No doubt *Roper* v. *Radcliffe*[10] declared generally, that a devise of lands to a papist was a purchase of them within the meaning of the Act of William III., to prevent the growth of popery; but when the attempt was made in *Foone* v. *Blount*[11] to apply that principle to money claimed by a papist for a debt due to him, which money was the produce of a sale of land made by a person other than the one incapacitated, that attempt was defeated.

[1] 6 Sim. 603.
[2] 1 Atk. 625.
[3] 3 Price, 368.
[4] 6 H. L. Cas. 338.
[5] 6 De G., M. & G. 74.
[6] 6 H. L. Cas. 672.
[7] 4 Sim. 360.
[8] 11 Hare, 69.
[9] 20 Beav. 560.
[10] 9 Mod. 167, 181. See also, 1 Str. 267; 2 P. Wms. 5; 10 Mod. 89, 230; 5 Bro. P. C. 360.
[11] Cowp. 464. See Ambl. 320, 767.

In *Richardson* v. *Horton*,[1] debts by specialty, in which the heirs were bound, were held to constitute no lien upon * the * 613 land. To bring the case within the statute there must be a direct and specific interest in the land: *March* v. *The Attorney-General*,[2] *Collinson* v. *Pater*,[3] and *Bligh* v. *Brent*,[4] which last case is specially referred to and adopted by Mr. Baron Parke in his judgment in *Watson* v. *Spratley*.[5] Now, the covenant here does not pass to the creditor either the land or an interest in the land. Though, therefore, the produce of the land may be used to benefit the charities, that will not make the covenant void. *Shadbolt* v. *Thornton*[6] is, in principle, a stronger case than this. There a lady left all her property, which consisted of leaseholds and of personalty, to her brother. The personalty was more than sufficient to pay her debts. Her brother died very shortly after her, leaving all his property to charities. His executors took out administration to her, and sold the leaseholds; and it was held, that as they changed their character in the intermediate process, and became pure personalty, the charities were entitled to the proceeds under her will.

Mr. Rolt replied.

At the conclusion of the reply, their Lordships expressed a wish to have the case argued by one counsel on a side before the Judges.

May 10.

The Judges who attended were the Lord Chief Baron, Mr. Justice Williams, Mr. Justice Willes, Mr. Justice Blackburn, and Mr. Baron Wilde.

THE LORD CHANCELLOR announced, that their Lordships had decided that the instrument was a deed, and not a * tes- * 614 tamentary paper, and said, that the arguments must be addressed to the following question: "Assuming the instrument dated 12th August, 1846, and purporting to be made between Benjamin Brame and certain gentlemen of the name of Alexander, to be a valid deed, is the sum of 60,000*l.* mentioned in the

[1] 7 Beav. 112.
[2] 5 Beav. 433.
[3] 2 Russ. & M. 344.
[4] 2 Younge & C. Exch. 268.
[5] 10 Exch. 222, 224.
[6] 17 Sim. 49.

deed now payable from the proceeds of the chattels real of the covenantor, there being no other assets from which such payments can be made?"

Mr. Rolt (*Mr. Speed* was with him) for the appellants, in addition to the previous argument, contended that,—The character of the gift must be ascertained by reference to the expressions used in the deed. The first of these is the desire to found these charities, and for that purpose to settle and assure part of his estate. The operative part then says, that in pursuance of this desire he enters into this covenant. The covenant is, that he will lay out the sum of 60,000*l.*, not in the names of the covenantees, but of one of them, and of three other persons; and if he does not, then that his executors shall, within twelve months after his death, pay that money on trusts which are clearly charitable trusts.

There could have been no breach in his lifetime. It was, therefore, a gift to take effect after his death, and not even then until, first of all, his debts, and then his legacies, were paid. On the same day his will was made. Three of the four persons named as executors are those who are payees under the deed. Then comes a codicil, which revokes the appointment of one executor, and appoints another, and that other is immediately afterwards declared to be a trustee under the deed. So that this deed is, at all * 615 events, a trust deed. In his own memorandum he * speaks of it as a will, but says that it has been put into the form of a deed to avoid the legacy duty. The examinations before the Master show that nearly the whole of the property consisted of mortgages on land. Was it not the intention of the Legislature to prevent such a proceeding as this? This instrument is void as a gift of a sum of money payable out of real assets to a charity. The deed itself; the fact that it was never delivered to any one; that its real nature was never stated; that it could be, if not formally revoked, at least effectually rendered unavailable, by the mere gift of the whole sum in legacies, or by the general gift of residue,—all these things show that it is a gift to take effect only after the death of the testator, and, being a gift of real assets so to take effect, but not being so executed as the statute requires, it is void. The law does not confine itself to the object of preventing the perpetual alienation of land, for, under given circumstances, that may take

place with perfect lawfulness; *Attorney-General* v. *Warren*;[1] but to prevent the disposition, under pretences of charity, of real property which the testator has fully enjoyed during his own life, but which he gives away at his death to the disherison of his heirs.

The first and third sections of the statute are material. They relate, not only to land and to money to be laid out in land, but to a charge affecting, or to affect, any lands, &c., which includes money arising from the sale of land, as is well shown in "Shelford on Mortmain."[2] All interest in land, therefore, whether the land is kept in the shape of land, or is turned into proceeds, will come within the statute. Otherwise, a gift of land itself might always be made by taking the form of a gift of the proceeds of land.

* Then, as to marshalling of assets. There is in equity * 616 no marshalling of assets in favour of a charity.

[LORD ST. LEONARDS. — They are not marshalled; they are separated and apportioned in separate parts, personal on one side, chattels real on the other; and if the gift to the charity is marked to come out of the personalty, it is good; if it must come out of the realty it is void.]

Exactly so; and that is the principle on which *Foy* v. *Foy*,[3] and *The Attorney-General* v. *Tyndall*,[4] proceeded. In neither case would the Court marshal assets so as to enable persons to elude the statute.

Here there is no consideration for the gift. How is this obligation to be enforced? Is the executor to say, "Though equity will not, in such a case, marshal the assets, I will?" Certainly not; he has no funds with which to satisfy this supposed debt without resorting to the mortgages. Yet those he cannot hand over in specie. Can he convert them into money, and hand over the money? He cannot. What is the right of the covenantees? Suppose they bring an action, recover judgment, sue out an *eligit*, and take possession, it could not, under such circumstances, be said that they were not within the statute. The supposed debt is clearly a charge within the statute. *Rolleston* v. *Morton*[5] explains this. Lord Chancellor Sugden there said, "That which formerly, by force of the Statute of Waste, was a general charge upon

[1] Per the Master of the Rolls, 2 Swanst. 302.
[2] P. 164.
[3] 1 Cox, 163.
[4] Ambl. 614, 2 Eden, 207.
[5] 1 Drury & W. 171–195.

lands, now, by force of the express directions of this Act,[1] becomes a specific lien. Words cannot be more express. If a man has a power to charge certain lands, and agrees to charge them, in equity he has actually charged them, and a Court of equity * 617 will execute the charge. When we * say, that every judgment creditor shall have the same remedies in a Court of equity as he would be entitled to in case the person against whom the judgment has been entered had agreed to charge the lands with the amount of the judgment debt, whether that charge be legal or equitable, the judgment becomes, in the view of this Court, an equitable estate. We are no longer dealing with a general lien, but with a specific incumbrance."

[THE LORD CHANCELLOR. — No doubt that a judgment, when obtained, is a charge upon land; but is the instrument which enables you to obtain judgment a charge upon the land?]

If it should be held, as a universal proposition, that it may not be so, a man might die possessed of nothing but land, and, by a contrivance of this sort, leave the whole to charities, in spite of all the provisions of the statute.

Mr. Roundell Palmer (*Mr. Surrage* was with him) for the respondents. — *Edwards* v. *Hall*,[2] and *Philpott* v. *St. George's Hospital*,[3] show distinctly that, unless a gift like this comes within the very words of the statute, it will not be void. In the former Lord Chancellor Cranworth said:[4] "I agree that it is absurd in these cases to talk about an evasion of the statute, because any one has a right to evade a statute if his meaning is to place himself in such a situation as not to come within its purview;" and in another place,[5] referring to the doctrine of tendency, he said: "Nothing is avoided by the statute which cannot by reasonable construction be said to be either a bequest of lands or of some interest therein, or a bequest of money, to be laid out * 618 in the purchase of lands or hereditaments, or some * interest therein." That is the argument here. In *Fisher* v. *Brierley*,[6] the Lords Justices held a deed of this sort to be valid. The idea of invalidating such a deed, merely because it had a tendency to defeat the statute, was distinctly rejected by this

[1] 3 & 4 Vict. c. 105 (Irish), § 22.
[2] 6 De G., M. & G. 74.
[3] 6 H. L. Cas. 338.
[4] 6 De G., M. & G. 84.
[5] Id. 88.
[6] 1 De G., F. & J. 643.

House, in *Philpott* v. *St. George's Hospital;*[1] and in *Barrington* v. *Liddell*,[2] Lord St. Leonards said, speaking of the Act against accumulations, "The Act specifies the cases to which the restrictions shall not apply; and this being so, why am I to go beyond the words of the Act, in order to do something which, if it had been intended, the Legislature would have expressed?" Here therefore it must be shown that what has been done is distinctly forbidden by the statute. Now, in the enacting part of the statute, there is no special provision for the prevention of the disherison of heirs; there is only a recital that that is an evil which has lately increased.

Then as to the third section of the statute, there is here no charge or incumbrance on land, but merely a debt by specialty.

[LORD ST. LEONARDS. — Not a debt properly constituted against himself. He was not under any obligation to leave a shilling of his property to satisfy it.

LORD WENSLEYDALE. — He was under a covenant to pay.

THE LORD CHANCELLOR. — A covenant which could not be broken in his lifetime.

LORD ST. LEONARDS. — And need not be broken after his death. He could have disposed, by will, of every shilling of his property in legacies. He was bound to nothing and to nobody.]

But he did not do this; and the legal effect of the deed cannot be impaired by the manner in which he had recited * his intention. He did not hand over his mortgages * 619 to the trustees; they must proceed on the covenant which created a debt. If the covenant is performed, it is merely a gift of money; if not performed, there would be an action on the covenant, in which money damages alone would be recoverable. It is immaterial that the judgment obtained might affect the land. The statute only struck at what would do so by the act of the party, not by the act of the law. That is a most important distinction. Then as to marshalling assets: why is the abatement of a charity legacy of money, derivable from land, to take place? Because it is the gift of the estate itself, and comes from every part of the estate, and the legatee is, therefore, the assignee *pro tanto* of the estate. Where that is not so, the legacy is good. *Foy* v. *Foy*,[3] and *The Attorney-General* v. *Tyndall*,[4] only show

[1] 6 H. L. Cas. 338.
[2] 2 De G., M. & G. 502.
[3] 1 Cox, 163.
[4] Ambl. 614, 2 Eden, 207.

that the Court will consider how the statute operates on the gift as it stands. And *Hayter* v. *Tucker* [1] shows, and some of the mining cases establish the same proposition, that where the person cannot take possession of the land itself, the mere fact that he will be benefited indirectly from the proceeds of it, will not bring the case within the meaning of the statute.

Mr. Rolt, in reply. — This is an attempt to do indirectly what the law will not permit to be done directly. The principle of the Bankrupt Statutes, which prevents a debtor from selecting a particular creditor for preference in payment, though that creditor's claim is in itself perfectly lawful and enforceable, must be applied here. *Philpott* v. *St. George's Hospital* and *Croft* * 620 v. *Lumley* only show that an attempt * to evade a statute may not bring the case within its provisions, but that the attempt must be to do that which is forbidden. It is so here. To make a gift like this void, it need not necessarily happen that the land itself comes into the hands of the charity. The gift of a mortgage would be void, yet the mortgage might never come into the hands of the charity donee, for the mortgagor might pay him off, and that shows the difference between the case as put by Lord Justice Turner and the present case. *Foone* v. *Blount* [2] does not justify the argument on the other side, but the other cases which apply against the act of the devisor are in point, and they relate to the matter as it stood at the time of his death. There is no doubt that charities may acquire land, but they must not acquire it in this way.

The question previously stated was then in form put to the Judges.

July 6.

Mr. Baron Wilde. — My Lords, I am of opinion that the deed in question can take no effect as regards the testator's real estate; and I come to this conclusion upon the simple ground that the deed and the proceedings contemplated to be taken upon it, are, and were intended to be, nothing else than the machinery by which the testator might appropriate his lands after his death to charitable uses. I am satisfied that the testator entered into this covenant for the express purpose of achieving indirectly that which he

[1] 4 Kay & J. 243.

[2] Cowp. 464.

could not do directly, without openly and plainly violating the Statute 9 Geo. 2, c. 36. It is hardly possible upon the facts of the case to arrive at any other conclusion.

This indirect violation of the statute no Court of law * ought, in my judgment, to uphold, if the words of the stat- * 621 ute are large enough to meet the case.

I agree that the operation of a statute is not to be extended beyond what the words express; but it is one thing so to read the words of a prohibition as to include all modes and ways of doing the prohibited thing; it is another to extend it to things not expressly prohibited. I think this case is within the very words of the statute, and that the testator has attempted to "give," "charge," and "incumber" his lands for charitable uses.

One who confesses a judgment for the purpose of bringing about a charge on his lands, does in substance charge and incumber his lands. One who enters into a covenant with a view of a judgment being obtained upon it, and so charging his lands, does still in substance, though more circuitously, charge and incumber his lands. One who, by means of a covenant, judgment, and execution against his lands, all contemplated at the time the covenant is entered into, contrives that his lands shall be given to charitable uses, does in substance "give" his lands to charitable purposes.

I, therefore, feel in no degree pressed by the arguments founded on the precise terms employed in this statute, and I regard all that has been done only as a circuitous method of "giving" the testator's lands for the benefit of this charity.

I construe the statute as if it had said in so many words, "directly or indirectly;" and I do so because I think it is plain, looking to the whole scope of the Act, that the Legislature did not intend that it should be lawful to do that by indirect means which it prohibited by every species of direct means that could be enumerated.

In such and analogous matters, the law always regards the substance and not the form or method. If a contract * is * 622 in substance tainted with usury, the Courts have always held it void, though the object of the contractors was ever so cunningly concealed in the form given to the transaction. If a contract is substantially a wager, no matter how the end is brought about, the same fate has always attended it in a Court of law. A still closer illustration is found in the case of a covenant not to

assign. The Court, once satisfied that the warrant of attorney was given for the purpose of bringing about a transfer through the medium of a judgment and execution, held the warrant of attorney to be a breach of a covenant not to assign. To hold otherwise would be, in my opinion, to invite a dexterous use of legal learning and forms to enable men to accomplish what the law forbids. In a word, it is the gift or devotion of lands to charitable purposes that is substantially prohibited here. If that is accomplished the statute is infringed, and, in my opinion, it signifies nothing in what manner that end is brought about.

MR. JUSTICE BLACKBURN. — My Lords, in my opinion the sum mentioned in the deed is payable from the proceeds of the chattels real of the covenantor.

It clearly is so payable, unless Statute 9 Geo. 2, c. 36, prevents it; so that the question, though involving a point of nicety and difficulty, lies in a small compass, depending entirely upon the effect of that statute.

The argument for the appellants, which in my mind raises the whole difficulty, may be stated thus: if payment is to be made from those chattels real, the ultimate effect of the deed must be that those chattels real, which belonged to the covenantor at the time of his death, will after his death be turned into money, and that money appropriated to charitable uses, and I think that, * 623 as a matter * of fact, the covenantor intended this result, and executed this deed for the express purpose of producing this result. Now if he had by will or a trust deed devised or conveyed any real estate (including in that term mortgages) upon trust, after his death, to convert it into money, and hand over that money to charitable uses, the trust would according to several decisions, of which *The Attorney-General* v. *Weymouth*[1] is the first, have been prohibited by the statute, and void.

The argument for the appellants is, that the covenantor here has tried indirectly to do by a circuitous mode that which he could not do directly, because the statute prohibited it, and that the principle laid down in the two cases of *Doe* v. *Carter*[2] is applicable to the present case. That principle was approved of in *Croft* v. *Lumley*,[3] though there was a difference of opinion as to its ap-

[1] Ambl. 20. [2] 8 T. R. 57, 300. [3] 6 H. L. Cas. 672.

plication in that case. The principle, as I understand it, is that whenever it can be shown that the acts of the parties are adopted for the purpose of effecting a thing which is prohibited, and the thing prohibited is in consequence effected, the parties have done that which they have purposely caused, though they may have done it indirectly, and endeavoured to conceal that they have done so.

This I think is a sound principle, but it is essential for its application, that what is thus effected should be the thing prohibited. If I thought that the statute now in question prohibited the gift to the charity of any money arising from the proceeds of real estate, unless that real estate was converted into money before the death of the donor, I should have thought this argument on the part of * the appellants well founded; but it seems to me * 624 that the statute does not prohibit this, and that the cases referred to proceed upon a different ground, and are not applicable to the present deed.

It is necessary, in order to see if this view is correct, to examine what is the enactment of the Legislature in Statute 9 Geo. 2, c. 36. The statute itself commences by a recital. The Legislature has itself here declared the object of the legislation, and what the mischief was which was intended to be remedied. This recital is therefore of much importance in construing the rest of the statute, though it will not justify the rejection of any enactment, though going beyond the object disclosed in the recital, if we find an intention to enact it expressed, nor the insertion of any enactment which we cannot find expressed in the enacting part, though we may think such an enactment required.

The statute after this recital proceeds to enact, that no manors, &c., or other hereditaments, corporeal or incorporeal, whatsoever, shall be in any way settled or incumbered in trust or for the benefit of any charitable uses, unless by deed indented made twelve calendar months before the death of the donor, and enrolled, and unless to take effect in possession immediately and without reservation, and by section 3 makes all such settlements void.

The prohibition, therefore, is in terms against any lands, &c., or monies converted into land, being conveyed, "or in anyways charged or incumbered," in trust or for the benefit of any charitable uses. The mischief which the Legislature intended to remedy appears by the recital to have been the bringing of lands into

mortmain by death-bed settlements. The enacting part absolutely prohibits and avoids the gift of any lands, &c., or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, &c. There is no intention indicated
* 625 * to prevent gifts of money to a charity. And so it was decided in *Sorresby* v. *Hollins*.[1] But it was decided in *The Attorney-General* v. *Weymouth*,[2] that a devise of land to be sold and the proceeds given to a charity was prohibited; Lord Hardwicke pointing out in his judgment, that the devise gave the charity an equitable interest in the land, and a right to elect to take it as land, and expressing his opinion that if the charity were to elect to take it as money it would make no difference, the statute having imposed the disability on the donor, not on the recipient. And in *The Attorney-General* v. *Meyrick*,[3] Sir John Strange, Master of the Rolls, decided that a devise to a charity of mortgage money was void. He points out that this devise gave the charity an interest in the land on which the money was secured.

In *The Attorney-General* v. *Harley*,[4] Leach, Vice-Chancellor, gives the following reasons: "The object of 9 Geo. 2, c. 36, as its title imports, was to prevent land becoming inalienable; but in order to secure that object the Legislature thought it prudent, not merely to prohibit gifts of land to charitable uses, but to prohibit gifts to charitable uses of any interest in land, being aware that by circuity and election the land itself might be acquired, in most cases, as the result of an interest in land. That money to arise from the sale of land is an interest in land admits of no doubt."

There are several other decisions that the gift of any interest in land whatever is void. In all of them I think it will be found that an interest, sometimes a very slight one, but always an
* 626 actual interest in or charge on some real * estate was given, and on this the decisions proceeded; and I think they were rightly decided. Perhaps the motives of the Legislature were those stated by Vice-Chancellor Leach, but whatever might be their motives, the statute does in terms avoid the gift of any estate or interest in lands, or of any charge or incumbrance affecting or to affect any lands, and it contains no words restraining this avoidance to such estates or incumbrances, as one within the mischief contemplated in the recital.

[1] 9 Mod. (8vo. ed.) 222.
[2] Ambl. 20.
[3] 2 Vez. Sen. 44.
[4] 5 Madd. 327.

It certainly may well be doubted whether those who framed the statute had it in contemplation to render void a devise of lands on trust to be sold, or a bequest of mortgages in trust to call in the mortgage money and give it to a charity; such a devise or bequest produces none of the mischief which is recited. So far from putting the land in mortmain, it expressly brings it into commerce, and it is very difficult to see any reason why the interests of the next of kin of a mortgagee should be more respected than those of the next of kin of a testator bequeathing a similar sum in the stocks on the same trusts. But the devise of the land to be sold, or the bequest of the mortgage money, does actually give the objects of the bounty of the testator an equitable interest in the land which is to be sold, or in the mortgaged estate, and therefore is within the very words of the statute, a gift of an interest in land.

In the present case the covenantor has avoided giving any interest or any charge, or any incumbrance affecting the lands. The charity has no more power over or interest in the lands than it would have had if a stranger had bequeathed to it the residue of his personal estate, and that testator had happened to hold as part of his estate a bond of Mr. Brame's; and, as is pointed out by Lord Justice Turner in his judgment, the uniform practice in Chancery * shows that a bequest of the bond of a landed * 627 debtor to charitable uses has never been considered invalid.

It is true that here the executors of the covenantor may break his covenant, and then the covenantees may obtain judgment, and so have a charge upon the covenantor's lands; and if it appeared that the deed had been in fact executed for the purpose of enabling the charity thus to obtain a charge on land, it probably would be void, on the principle of *Doe* v. *Carter*,[1] already mentioned. But there is no ground for supposing that there was any such purpose. The covenantor purposed that his executors should keep the covenant and pay the money, so that the charity never should have any interest in or charge on the land.

It seems to me that the prohibition of the Legislature is against giving an estate, or interest in, or charge on land, to the charity, not against giving to it money arising from land. The Legislature has for greater precaution imposed a restriction beyond the object

8 T. R. 57, 300.

in view. That restriction cannot be rejected, because it is plainly expressed; but the appellants in effect ask that a farther enactment should be interpolated containing a prohibition of that which is not within the object the Legislature had in view, and which restriction, if the Legislature had thought of it, it probably would not have intended to impose. At all events the Legislature has not expressed an intention to impose such a restriction. I think we cannot interpolate such an enactment, and therefore I answer your Lordships' question in favour of the respondents.

MR. JUSTICE BYLES. — My Lords, assuming the deed of 1846 to have been a valid deed, I am, nevertheless, of opinion that * 628 the sum of * 60,000*l.* therein mentioned is not now payable from the proceeds of the chattels real of the covenantor.

The object of the Act 9 Geo. 2, c. 36, § 2, was to check alienations of land to charitable uses, by enacting that the gift shall be at the personal expense of the donor himself, and not merely of those who are to come after him; for men are not so prone to generosity at their own expense as at the expense of others. To this end the statute provides that the gift or conveyance must be made at least a year before the donor's death, must take effect immediately, must be irrevocable, and, to secure irrevocability, must be published and recorded by enrolment within a short time after execution. It enacts that otherwise no lands shall "anyways" be conveyed or "anyways" charged in favour of a charitable use; and in section 3, that all transfers in trust for any charitable use otherwise made shall be absolutely void.

Chattels real, and money secured on mortgage, have been decided to be, and are admitted to be, within the statute. They cannot be conveyed to a charity, nor can any trust of them in favour of a charity be created without a deed duly executed and enrolled, nor can a legacy to a charity be paid out of them.

The statute is not only in its nature, but in its terms, as appears both by the recital and the commencement of the first enacting clause, a remedial Act, and therefore it is to be construed liberally and beneficially, so as to suppress the mischief and advance the remedy. I conceive, therefore, that what the statute forbids must not be done either directly or indirectly, or, to use the language of the Act, it must not "anyways" be done.

There are many instances in which attempts have been made to break sometimes through Acts of Parliament, and sometimes through conventions between parties, by ingenious * arti- * 629 fices, which at first sight seem rather the acts of the law than the acts of the parties, and therefore appear to be no violations either of the Act of Parliament in the one case, or of the contract in the other. But when a Court of law sees that the real intention of the contriver was to violate a statute or a contract, and that that intention has been, in point of fact, effected by using acts of the law to compass what the statute or the contract prohibits, the Judges have looked through the form at the substance and real nature of the transaction.

The numerous decisions on the repealed Usury Act, 2 Anne, st. 2, c. 16, are instances in point. "Where," says Lord Mansfield, "the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute;" *Floyer* v. *Edwards*.[1] It is true that that statute enumerates and forbids many contrivances in express terms, but the statute under consideration comprises a corresponding provision, although in more general language, for it expressly enacts that what it forbids shall not "anyways" be done, though it needs no such words, for it is, as already observed, a remedial Act.

A familiar instance of the same rule of construction, when applied to contracts, is afforded by the well-known case of *Doe* v. *Carter*.[2] There a termor was under a condition not to assign; he gave a warrant of attorney, and the lease was taken in execution. It was held after the first trial, at which no intention had been found, that the execution was the act of the law, and no breach of the condition; but the jury having afterwards, on a second trial, found that the warrant of attorney was given with the intention and for the purpose of enabling the creditor * to take the lease under the execution, and so to get rid of * 630 the restraint on assignment, it was held that the seizure of the term by the creditor was no longer to be considered the act of the law, but the act of the party who had used the law as a mere tool to effect his purpose.

So in *Sharpe* v. *Thomas*,[3] it was held that a warrant of attorney given by a man who intended to take the benefit of the Insolvent

[1] Cowp. 114. [2] 8 T. R. 57, 300. [3] 6 Bing. 416.

Debtors Act was a charge on his property within the meaning of the Act. Though the execution was the act of the law, yet the debtor's intention made it the act of the party, and changed its nature; or more properly speaking, the Court of Common Pleas disregarded its form, and looked only at its real nature.

So here the true question seems to me to be a question of intention; and although intention be rather matter of fact than of law, yet I cannot answer your Lordships' question without coming to a conclusion as to Mr. Brame's intention. Original intention may give to an act the character of a grant or conveyance; continuing intention may make the result certain. Looking at all the circumstances, did Mr. Brame intend to do that which the law forbids, and has he taken such measures to accomplish his intention as to make the violation of the law the necessary consequence? I do not say, did he intend to evade the law, but did he intend to violate it; for it has been said that a man may evade a statute if he can, yet, on the other hand, it is plain that he must not violate it directly or indirectly. The word intention is equivocal; it may denote an intention to do that which is designed as an aim or main object of the intending party, or it may mean that which he *631 merely foresees as a result to which he is indifferent. *It is in the first sense, the sense of purpose or aim, that I use the word. The question, then, may be more definitely put in this form: Was Mr. Brame's object to reserve the enjoyment and disposition of his investments on real property to himself during his life, and after his death to give them, or money secured upon land, without deed duly executed and enrolled, to a charity? If he intended that as an object and purpose of his arragements, then he intended to do what the statute prohibits, and what cannot, directly or indirectly, or in the language of the statute itself, "anyways," be done. I think there is cogent evidence that Mr. Brame did so intend.

It will be observed that his property consisted almost entirely of mortgages, many of them freehold mortgages, at interest ranging from four to four and a half and five per cent. The suspicion is at once awakened, that he always intended to do what in fact he did, that is to say, to enjoy the benefit of these first-class investments as long as he could, and even should any of them in his lifetime be paid off, his profession and his habits would probably lead to re-investments of the same description. Whether there

were, after the deed, such re-investments, does not indeed appear from the evidence, but neither does it appear that there were any investments or re-investments of a different kind. He seems, from the evidence, to have intended to enjoy his mortgages to the last moment of his life. In other words, he intended, whenever he should die, to die with his property so invested. If so, he intended that the money covenanted to be paid to the charity should be paid out of those mortgages, and he finally made it necessary and certain that it would be so paid. But when the charity foundation deed of 12th August, 1846, comes to be compared with the will of even date, the intention becomes still more apparent.

He adopts in the deed two extraordinary * expedients; first, * 632 the expedient of an alternative covenant, which though it might be performed in his lifetime, could not be broken in his lifetime; next, he postpones the debt of 60,000*l.* to any legacies he might leave by any will. Then, when he on the same day makes his will, he leaves no residuary bequest whatsoever, and so causes the bulk of his property to be disposed of after his death by the deed. The effect of the two instruments, taken together, is to place the charity nearly in the position of an intended residuary legatee. It is true the charity will be in form a creditor, with legal remedies, and not in form a residuary legatee. But this singular sort of debt created by the deed is like a residuary bequest, to be paid after other legacies; and, like any other bequest, it is subject to be cut down or destroyed by any codicil or subsequent will. It is revocable. He has given the form of a debt to that which is in substance a legacy, and a legacy in those respects in which the Mortmain Act considers a legacy objectionable. It is voluntary, revocable, and not to take effect in his lifetime. What he has done comes to this: Instead of saying by his will, I bequeath to the charity all, except what I shall owe (which the law would not allow), he says, by the deed, I owe to the charity all, except what I shall bequeath; the difference in both cases being the same sum invested in the same manner. Why did he adopt the empty form of an alternative covenant to pay in his lifetime or after his death, the first alternative being one which could never be broken or enforced; and why postpone this debt to legacies? Because the alternative made the covenant look more like a real covenant, and because he desired that that, which was in substance a legacy, should assume the form of a covenant.

The keeping the deed in his own possession, and tying it up with his will, is another indication that, though in form
* 633 * and legal effect it is a deed, yet he intended it to operate indirectly as a testamentary instrument.

Another and a much stronger indication of this intention is, that he never communicated the contents of the deed to any one of the covenantees. It is true that the deed is to be assumed to be, and was, a valid deed and seems irrevocable. But he thus practically by secrecy secured in another way the revocability of the instrument, and so attempted to confer on it one of the distinguishing characteristics of a testamentary paper.

It is not necessary, to make an intention illegal, that the intending party should even know that the law which he intends to contravene, exists; it is enough that he intends to do what the law, known or unknown to him, forbids. But if you find that the intender knew that the purpose at which he may have aimed was forbidden, then the state of his knowledge may throw light on the true nature of his scheme, and fortify the suspicion that it is a scheme to do what the law forbids. The fact that Mr. Brame was a professional man, and the farther fact that he had, as may be collected from the evidence, the assistance and advice of an eminent counsel, understanding the applicability of assets, real, personal, and mixed, as well or better than most men, render it impossible to suppose that Mr. Brame had not the Mortmain Act in his contemplation; and if any doubt could remain, it is removed by an allusion to it in the paper which was tied up with the will and the deed. The continuance of Mr. Brame's property vested in real securities down to the time of his death; and his satisfaction at having both the deed and the will brought to him, when he evidently considered himself to be, as in fact he was, at the point of death, show that the state of his affairs when he died, and the operation of his deed and will upon his property, when it
* 634 had become certain that these * mortgages would go to the charity, were satisfactory to him, and regarded by him as a fulfilment of his original intention. These considerations lead me to the conclusion that Mr. Brame drew the deed with the Mortmain Act before him, and intended from first to last to do that which the statute forbids: to keep his mortgages to himself during his life, and to let the charity at his decease have the money then secured by them; but that he hoped to evade the law by giving the

form of a debt to that which he intended to be in substance a legacy, and a charge upon land.

It is said the sum payable by the deed is a debt for which the creditor has legal remedies. Suppose before the recent alteration of the law with respect to entering up judgment on warrants of attorney, Mr. Brame had resorted to a different scheme, and had said expressly just before he died, "I cannot by law leave my chattels real to the charity, or charge them in favour of the charity, but I can do what will have the same effect; I will execute a warrant of attorney to trustees of the charity for the sum of 60,000*l.*, and then judgment may be entered up against me immediately after my death." Such a warrant of attorney would have made the charity in form a creditor. But the case before cited, *Sharpe* v. *Thomas*,[1] seems to show that judgment and execution on this warrant of attorney would have been a charge and void. The artifice accompanied by the express declaration of intention would have been transparent. In the case before your Lordships, the more indirect and refined artifice interpreted by the covenantor's conduct seems to me to be scarcely less so.

It is objected that the deed, if inoperative, for the intended purpose, must have been invalid at the time of its * execu- * 635 tion. But I think that is not so. The deed when executed was perfectly good, and is even now good as to assets purely personal, although at the time of its execution it was intended to form part of a scheme to violate the Act of Parliament. Suppose, after executing the deed with that intention, Mr. Brame had converted his chattels real into pure personalty and had then died, the deed would surely have been good. So in the case of *Doe* v. *Carter*, though the warrant of attorney had been given with the purpose of violating the provisions of the lease, yet if the term had been surrendered before the issuing of the writ of execution, or if any other property than the term had been seised under it, the judgment and execution would have been deemed the act of the law and not the act of the party. It is an elementary principle that a deed may not only be void or voidable, but even when void may be void as against some persons and not as against others, and void for some purposes and not for others. So this deed, though good at the date of execution, may yet be afterwards void, so far as it is sought to be used for the purpose of carrying into

[1] 6 Bing. 416.

effect a scheme for a gift of chattels real to a charity, being a deed not executed and enrolled according to the statute.

Then it may be said that the ultimate object of Mr. Brame was not to give to the charity any interest in his chattels real or any real security at all, but only to give to the charity the proceeds of his chattels real in the shape of pure personalty, and that his ultimate object only is to be regarded. No doubt this was his ultimate object, but he intended to accomplish that object by securing an intermediate and illegal object beneficial to himself; that is to say, to keep his investments on real property for his own enjoyment during his life, and then to place the charity in the
* 636 same position as if he had left to it a legacy which * could only be paid out of land. This intermediate object was, as I collect from the evidence, contemplated by him not as an indifferent result, but as a purpose, for a considerable portion of his income depended on keeping the chattels real to himself during his life. If the intermediate object was illegal, it matters not that the ultimate object was free from objection. When a testator leaves a pecuniary legacy to a charity, yet if it must come out of assets savouring of the realty, it is void, even although he did not contemplate its being paid out of those assets.

Lastly, it is said that his intention was to avoid the legacy and probate duty, and there is evidence of an intention to do so, though even that evidence is accompanied with an expression of doubt whether the object will be fully attained. But this intention alone will not explain what he did. He might have effectually avoided the legacy and probate duty by making over his chattels real to the charity in his lifetime by deed enrolled. Why did he not do that? Plainly because he had another and paramount intention, the intention of enjoying them during his life, and of leaving them by some means to the charity after his death.

For these reasons, I am compelled to answer your Lordships' question in the negative.

Mr. Justice Willes. — My Lords, I answer the question put to the Judges in the affirmative. The question in effect is, whether the deed could be enforced by action, judgment, and execution, in the ordinary course of justice administered in the Courts of common law. The deed being *ex hypothesi* valid, this question could only arise with respect to the execution, if at all.

Now, assuming an action brought against the executors, * hostilely contested by them, and judgment obtained by * 637 the covenantees, what law, what machinery of the Courts, could arrest the execution on such judgment, so far as it affected chattels real? There is no such law, and no such machinery.

It is erroneous to suppose that execution upon a judgment against the executor in an action upon a deed operates by way of charge upon the chattels real in his hands, any more than if the action were upon a bill of exchange. Nor is a post-obit bond a charge any more than one payable in the lifetime of the obligor.

The execution upon such a judgment is but the mode by which the law enforces *in invitum* the payment of that which is no charge, and is, therefore, valid and enforceable.

To say that what was done was an "evasion" of the law is idle, unless it means that, though in apparent accordance with, it really was in contravention of the law, which the deed in this case was not.

It was well said by Hales, Justice, in *Colthirst* v. *Bejushin*,[1] that "when a person has a lawful property in any thing he may give or convey away the same, where, when, and how he pleases, so that his intent be not against law or reason, or repugnant in itself." To defeat or detract from the force of a man's "valid deed," by subtle and remote construction or speculation, is repugnant to law, inasmuch as it is but a bad sort of *ex post facto* legislation.

The much misunderstood maxim, "*Dolus circuitu non purgatur*," is inapplicable to this case, because there can be no *dolus* without a breach of the law; and to apply the * maxim * 638 here would be to beg the question, and indeed to contradict the hypothesis.

A rule of law more properly applicable is, "*Lex spectat ad proximam non ad remotam causam.*"

The statute which strikes at the instrument creating a charge does not affect the execution upon a judgment in an action upon an instrument not creating a charge, which judgment can only be obtained by the intervention of a Court, in an action which may be defended.

I am of opinion, therefore, that the sum mentioned in the deed is payable from the proceeds of the chattels real of the covenantor.

[1] Plowd. 31, *a*.

MR. JUSTICE WILLIAMS. — I am of opinion that your Lordships' question ought to be answered in the affirmative.

It may be observed, that the assumption on which the question is put, viz., that the instrument in question is valid, is an assumption of the very point on which, according to the opinion, apparently, of all the Judges under whose consideration the case had been before it reached your Lordships' House, the whole controversy turns. The Master of the Rolls, both the Lords Justices, and also Wightman, J., and Erle, J., treat, as it seems to me, the question of the validity of the deed as the only thing to be determined. And I must add, that I entertain the same view, because I think that if it is conceded that the deed is not void, as being neither within the words nor against the policy of the statute, it necessarily follows that the covenant therein must be satisfied by payment, if the executors of the covenantor have (as it is admitted they have) sufficient assets for that purpose.

A great deal of discussion took place at your Lordships' * 639 * bar as to the intention of the Act, and whether its aim was to prevent the inalienability of land consequent on charitable dispositions, or whether its object rather was to prevent improvident gifts by dying persons. On this question the authorities are conflicting. Whichever is the better opinion, the Legislature appears to have been somewhat capricious in the enactments of the statute. It is not easy to understand why, in the reign of George II., when personal property had so long ceased to have that insignificance which in early times had caused it to be disregarded in legislation, an Act should be passed allowing unfettered charitable dispositions of personal estate generally, but annulling them if the gift was charged in any manner upon or amounted to any interest in a real estate.

But whatever may have been the purpose or policy of the Act, if the covenant in question is to be regarded as valid, the only way in which, I apprehend, it can be argued that the chattels real of the covenantor are not applicable to the discharge of the covenant debt is, by contending that the effect of the valid deed is to create, in the event of the covenant debt being thrown on the chattels real, a charge affecting lands, which is made void by the statute, and ought not, therefore, to be paid out of that fund. And the case of *Doe* v. *Carter*[1] was much relied on in support of this

[1] 8 T. R. 57, 300.

argument. In that case there was a covenant between a lessor and lessee not to assign, and it was held that where the lessee gave a warrant of attorney for a debt on which judgment was entered up and execution issued, and the sheriff sold the term to the defendant, this did not amount to a breach of the covenant because this assignment could not be properly considered as the act of the lessee, but must be regarded as a proceeding *in invitum*. On the same state of facts, when it farther appeared that the warrant * of attorney was given by agreement between * 640 the lessee and the defendant for the express purpose of having the term assigned under the execution, in fraud of the covenant, the same Court held there was a breach of the covenant; because the whole transaction was performed in order to enable the tenant to convey his term to his creditor, which he could not do directly, and should not be allowed to do indirectly. It was accordingly urged, on behalf of the appellants in the present case, that if this covenant could be enforced by a suit and judgment thereon, the chattels real might be charged; and inasmuch as this result was what the testator intended by entering into the covenant, the charge was his act, and so void by reason of the statute.

But I think the cases are easily distinguishable. In *Doe* v. *Carter*, the lessor intended that there should be an assignment of the term under the execution; and, in fact, there was one, which was held to be an assignment by him, and so a breach of the covenant. But in the present case there is, I think, no just ground for supposing that the covenantor intended that the chattels real ever should be charged by any judgment in a suit on the covenant. On the contrary, it appears to me that he thought the covenant was not prohibited by the statute, because there never would be any charge by this or any other means on the chattels real; and there surely never would be any such charge if his executors, in the usual course of their duty, sold the chattels real, and applied the proceeds in satisfaction of the covenant debt.

But, on behalf of the appellants, the case of *The Attorney-General* v. *Lord Weymouth*[1] was cited, where a bequest to a charity to arise from the sale of real estate was held to be within the statute and void. In that case, however, the real estate was directly charged with the gift, and * the charge would * 641 follow the land into whatever hands it went. But the cove-

[1] Ambl. 20.

nant in the present case is no charge on the chattels real. The executors of the covenantor might have sold them, and would have passed an absolute title to the purchaser, altogether discharged from liability in respect of the covenant. Even if the covenant had been sued upon, and judgment obtained against the executors, the judgment creditor could not follow the chattels real if they had been aliened by the executors before judgment recovered, any more than he could follow the real assets, descended or devised, if the heir or the devisee had aliened them before action brought.

The difficulty of maintaining the proposition that the sum covenanted to be paid is not payable from the chattels real of the covenantor, on the assumption that the deed is valid, will be made apparent, I think, by considering what the course of a suit at law would be, if brought by the covenantee against the executors of the covenantor. They could plainly plead no plea in bar, because, by the hypothesis, the deed is valid, and there are sufficient assets in their hands. Judgment must necessarily, therefore, go against them, *de bonis testatoris si*, and *si non*, for the costs, *de bonis propriis*. They might surely satisfy this judgment by paying the whole amount, if they had realized it by a previous sale of the chattels real, or if they could raise it from any other sources. If such a course were taken, it is difficult to see at what stage, or point, or period, the infraction of the statute, or illegality, or invalidity of any part of the proceedings commences, so as to justify the interference of any Court of law or equity. Again, suppose that the judgment being unsatisfied, the covenantees sue out execution, and a writ of *fieri facias* is put into the hands of the sheriff, how is he to be prevented from seizing and
* 642 selling under it the chattels real of the covenantee if * they remain in the hands of his executors, and paying over the proceeds according to the exigency of the writ ?

But it is plain that the executors ought not to subject themselves to an action. If they have assets in their hands sufficient to satisfy the debt, they ought to pay it without the compulsion of a suit, according to their ordinary duty, and according, I have no doubt, to the intention and expectation of the covenantor in this case. If this course be taken, it is plain that neither the deed itself, nor any thing growing out of it, would amount to a charge, in any sense, on the chattels real, or to any other thing prohibited by the terms of the statute. Neither is the covenantor guilty of

any evasion (using that phrase as meaning an indirect infraction) of the statute. He has, in truth, done a thing which the statute has omitted to prohibit, and which, therefore, he might lawfully and effectually do; viz., he has, for the benefit of a charity, entered into a pecuniary obligation, to be performed by him in his lifetime, or his executors within a certain time after his death, which, like any other such obligation, may, after his decease, be enforced, if not paid without suit, not only against his estate, purely personal, but also against his real estate and chattels real.

For these reasons I am of opinion that the sum of 60,000*l.* is now payable from the proceeds of the chattels real of the covenantor.

Lord Chief Baron Pollock.—The question proposed to the Judges presents to my mind some difficulty, inasmuch as the common law Judges are rarely (perhaps never) called upon, in the discharge of their duties in their own Courts, to decide from what fund or from what portion of an estate a debt shall be paid, if it is really due and must be paid.

* If the deed is valid, so that an action can be maintained * 643 upon it, and if an action is brought, and judgment pronounced for the plaintiff, I do not see how the Court could prevent the debt from being paid out of the proceeds of chattels real, if there were no other assets from which payment could be made. I may also crave your Lordships' indulgence while I express a doubt whether I fully comprehend what we are to assume as to the deed being valid. The deed may be valid for some purposes and not for others; it may have been valid to the extent of the personal property of the covenantor, and void as to his real property; it may have been valid so far as it was a covenant to pay during his lifetime, and it may have been void so far as it was a grant out of his assets, real or personal, after his death.

In answer, however, to the question, whether it is now payable from the proceeds of the chattels real of the covenantor (there being no other assets from which such payment can be made), I am of opinion that it is not so payable.

It is not necessary to repeat the words of the statute or the construction that has been put upon them, and by which they are applicable to mortgages as well as to real estate, and then the question is, substantially, whether a covenant that the executors of the

covenantor shall, for the benefit of certain charitable uses, apply 60,000*l.*, to be raised out of his chattels real, is a good covenant. It would be admitted that in this form it would not; but it is said that if by a covenant he creates a debt, and thereby enables the covenantee to sue the executors, and obtain indirectly what it would have been unlawful to obtain directly, the covenant is good, and the object may be accomplished. It appears to me that this is quite opposed to the whole spirit of the English law, and to * 644 the general current of authorities; and * I think it quite unimportant whether this was a device on the part of Mr. Brame or not; he may have been utterly ignorant that there existed such a statute as the 9 Geo. 2, and may have had no intention to break it or evade it. I form my opinion quite independently of the motive of Mr. Brame or his intention, but upon this plain ground, that if it is not lawful to grant or transfer, or to charge or incumber, a certain description of property for a particular purpose, it cannot be charged or incumbered by creating a fictitious debt on which an execution may issue to produce exactly the same result.

July 30.

THE LORD CHANCELLOR (LORD CAMPBELL). — In a suit in the Court of Chancery for the administration of the estate of Benjamin Brame, the question arose whether the sum of 60,000*l.*, mentioned in an indenture dated 12th August, 1846, executed by Benjamin Brame, was payable out of chattels real?

It was objected, that this indenture could not be considered a valid deed, because it had not been duly executed as a deed. This objection was, I think, properly overruled by the Lords Justices. Although I cannot agree with Lord Justice Knight Bruce, as his judgment is reported,[1] that it might be available as a deed, whether capable or not of being admitted to probate as a will, I think it was duly executed as a deed; and that, as it contained no power of revocation, and was not ambulatory, it operated as a deed, notwithstanding that it was voluntary, and that it remained in the custody of the covenantor till his death.

Now, is there any ground for saying that the deed was * 645 absolutely void under the 9th Geo. 2, c. 36? for, *ex facie*, * it does not violate that statute, and if the covenantor had died possessed of pure personalty only, sufficient to pay the 60,000*l.*

[1] 7 De G., M. & G. 535.

beyond debts and legacies, the whole sum of 60,000*l.* might have been recovered by the trustees for the benefit of the charities.

Therefore, the true question could not have been determined as was supposed, in an action at law upon the indenture. The direction of the Master of the Rolls, that an action at law should be brought on the indenture, appears to me to have been improper. And, with the greatest respect for the learned Judges who answered in the affirmative the question put to them by your Lordships, I think they gave too much weight to the consideration that an action might have been maintained on the indenture. Perhaps there might have been a special plea by the executors, that they had no assets except chattels real; but this is the only way in which the question could have been raised at law; and there would have been great difficulty in deciding whether any marshalling of assets was the subject of legal jurisdiction.

However, the decision of the Lords Justices that the indenture is a valid deed being readily acquiesced in, the important question remains, "Whether the 60,000*l.* mentioned in the deed is now payable from the proceeds of the chattels real of the covenantor, there being no other assets from which such payments can be made?"

I agree with the learned Judges who answered this question in the negative. I am of opinion, that within the meaning of the third section of the Mortmain Act this deed operated as "a gift and settlement of an estate and interest in land, and of incumbrances affecting lands in trust for charitable uses."

When I look at the evil described in the preamble of the Act, from "improvident alienation or dispositions * made * 646 by languishing and dying persons to uses called charitable uses, to take place after their death to the disherison of their lawful heirs;" when I look to the sweeping enactment in the third section, and when I look to the decisions showing that devises and bequests, the certain effect of which is to bring land into commerce, may be void upon a just construction of the statute, — I cannot concur in the opinion, that the only object of the Legislature in passing the 9 Geo. 2, c. 36, was to prevent land becoming inalienable by being brought into mortmain. I do join in the wonder that so little account was then taken of pure personalty, which, although hardly to be regarded in ancient times, had accumulated to an immense amount. But the statute does indicate a great anxiety to guard "languishing and dying persons" from the at-

tempts of those around them to induce them to make "improvident alienations and dispositions to the disherison of their lawful heirs." And, although there is no enactment which reaches pure personalty, the language used is most copious, express, and pointed, to extend to chattels real, such as mortgages, with which this case has to deal.

I agree in all that has been said about Courts of justices not being able to prevent the mere evasion of a statute; but if what is called an evasion is a clear violation of the statute, Courts of justice are bound to see that the expressed intentions of the Legislature shall not be defeated. Is it not the expressed intention of the Legislature by this statute, that, without conforming to the requisitions specified in the first section, a man shall not in his lifetime, by any gift or settlement, appropriate his chattels real to be applied at his death for charitable uses, he remaining in the possession of the chattels real, and having complete control over them till he dies? Is not the statute violated by a person * 647 doing what certainly and inevitably leads to * such appropriation at his death, after such possession and control during his life?

To see that what was attempted by the covenantor was of this nature, we have only to read the deed, and to attend to the state of his property and his affairs when he executed the deed, and the state of his property and his affairs at his death. It was only from the proceeds of his mortgages that the 60,000*l.* could be paid, and from the proceeds of the mortgages the 60,000*l.* must and will be paid, if the statute does not interpose. Attending likewise to the other deed, and to the will which he executed at the same time, and to the manner in which he kept and described these three instruments, there can be little doubt that he really meant them all to be testamentary, and jointly to constitute his last will and testament. He carefully concealed the charity deed, and he knew well that even if it had got into the hands of the trustees, no action could have been brought upon it against him in his lifetime; but that upon his death, if the intended effect was given to it, it would operate as a charge upon his chattels real, there being no other fund from which the sums destined to create the different charities could be paid.

Suppose that, at the time of his death, he had no property whatsoever except mortgages, and that, instead of executing a deed,

he had, by his will, left the 60,000*l.* to charitable uses, without expressly charging the legacy on the mortgages, would not this have been an infraction of the statute, as much as if he had charged the legacy on the mortgages, or had bequeathed the mortgages to be sold, and the proceeds to be applied to the endowment of the charities? Surely that may not lawfully be done indirectly which the law forbids to be done directly.

My Lords, I abstain from referring to the authorities which have been cited, and which have been already so * copiously and ably commented upon by the learned Judges; * 648 but, having carefully examined them, I think I may say that they support this reasoning, and that not one of them can be pointed out which requires a different construction of the statute.

Before I conclude, I cannot refrain from noticing one argument strongly urged, that this statute, passed to restrain abuses and mischiefs recited in the preamble, is a statute in restraint of natural rights and natural liberty, and therefore ought to be strictly construed. A man has a natural right to enjoy his property during his life, and to leave it to his children at his death; but the liberty to determine how property shall be enjoyed *in sæcula sæculorum* when he, who was once the owner of it, is in his grave, and to destine it in perpetuity to any purposes however fantastical, useless, or ludicrous, so that they cannot be said to be directly contrary to religion and morality, is a right and liberty which, I think, cannot be claimed by any natural or Divine law, and which, I think, ought by human law to be strictly watched and regulated.

We have an ample admission from those who thus reason, that the decision appealed against, if affirmed, would practically operate as a repeal of the Statute of Mortmain, by pointing out an easy and safe contrivance by which it may always be evaded. This is not the occasion to discuss the merits of that statute, and therefore I will say no more than that, instead of wishing to see it repealed, I should be glad if it was extended to all personal property, and if some reasonable limits could be put to the purposes for which property may be perpetually appropriated, and if some provision could be made for periodically reviewing charitable foundations, and remodelling them as it may be supposed the founder would have wished them to be remodelled, * could he have * 649 foreseen the change of manners and institutions which has taken place since he was removed from this world. At all events,

even if a repeal of the Statute of Mortmain would be salutary, let it be repealed by the Legislature and not by judge-made law.

For these reasons, my Lords, I must advise your Lordships that the decree appealed against should be reversed, and that the cause be remitted to the Court of Chancery, with a declaration that the sum of 60,000*l.*, mentioned in the charity deed, is not payable from the proceeds of the chattels real of the covenantor.

LORD CRANWORTH. — I have the misfortune, in this case, to differ from my noble and learned friend on the Woolsack. I think that the decree of the Lords Justices was right, and ought to be affirmed.

The instrument in question is certainly a deed, and not a will. It was duly executed as a deed, and was evidently intended to be irrevocable. The authorities all show that it did not lose its binding force by being retained in the custody of the party who was bound by it. That circumstance might leave it in his power to destroy it, with little chance of detection; but if he had done so, he would have been a wrongdoer. Such an act would not have altered the rights of those interested, though it might have made it difficult for them to prove their rights. Treating it then as a deed, it is valid unless it is made void wholly or partially by the 9 Geo. 2, c. 36.

There can be no doubt of its validity so far as, in a due administration of the assets, it would affect the pure personal estate only; for to that extent it would have been valid if the provisions in favor of the charities had been made, not by this deed of covenant, but by the will.

* 650 * The question is, whether the deed is valid as to so much of the money covenanted to be invested as can only be obtained by means of assets other than pure personalty. I think it is. It would certainly have been valid before the passing of the 9 Geo. 2, c. 36. Therefore, if it is now to any extent invalid, that must be because payment of the sum covenanted to be paid is to that extent prohibited by the statute. I concur with what I understand to have been the opinion of the Master of the Rolls, namely, that the question is a purely legal question. If the covenant can be enforced at law, that must be because there is nothing in the statute which prohibits such a mode of securing money for charitable uses, and the statute must receive the same construction in all Courts, whether of law or equity.

Then, does the statute prohibit the payment of money due in this covenant, so far as the funds for making the payment are to arise out of real estate, or assets partaking of the nature of realty? The only clause in the statute which can be contended to have such an effect is the third, which makes void, *inter alia*, all gifts for any charitable use of any lands, or of any charge or incumbrance affecting lands, not made by deed indented and enrolled in manner specified in the Act.

The argument on the part of the appellants is, that this is in substance, though not in form, the gift of a charge or incumbrance affecting land, and so that it is made void by the clause to which I have referred. First, it is said to be a gift, because it is a voluntary obligation, incapable of being enforced till after the death of the covenantor, and such obligations are in the administration of assets in the Court of Chancery postponed to all *bonâ fide* debts, and so sometimes said to be in the nature of legacies; and secondly, the gift is said to be the gift of a charge or incumbrance * affecting land, because it is a gift which, having regard to * 651 the state of the testator's assets, could not be satisfied, except to a small extent, otherwise than by means of the mortgages of which the testator was possessed at his decease.

With the first part of the appellant's argument, that which describes this deed as a gift, I agree, if by being a gift is meant, that it is only to be satisfied after all *bonâ fide* debts are paid; but I cannot concur in the second branch of the argument, namely, that it is a gift of a charge affecting land within the meaning of the statute. It is true, that where the proceeds of an estate devised to be sold are directed to be applied to charitable uses, the gift is void, though such a devise would have no tendency to bring lands into mortmain. Nothing goes to the charity, in such a case, but money; and it was therefore contended, soon after the passing of the statute, that such a gift was not prohibited. Lord Hardwicke, however, decided that it was; he held it to be the gift of a charge on land, for he considered it would be absurd to hold that the 3d section of the statute prohibited the gift of a specific sum to be raised by a sale, but did not prohibit the gift of the whole proceeds of the sale. That was held in the case of *The Attorney-General* v. *Lord Weymouth*.[1]

But how does that apply to the case now under appeal? There

[1] Ambl. 20.

is here no express charge on land, and I cannot discover when or how any charge on land arose. Not when the deed was executed, for the testator might, in his lifetime, have realized all his mortgage securities, and have invested the proceeds in three per cents, and the same power remained with him up to the moment of
* 652 his death. * And if no charge was created by him in his lifetime, it seems to me impossible to contend that his death, without more, made that a charge which was no charge while he lived.

It was contended that this being in the nature of a gift to be satisfied out of the assets, as if it had been a legacy, the rules applicable to the satisfaction of legacies must be acted on, and that so much as would have to be satisfied out of the mortgages must, therefore, be treated as a gift, payable out of them. I cannot agree to this. When it was established (whether on solid grounds or not, I do not stop to inquire) that assets are not to be marshalled in favour of a charity, every will containing a charitable bequest must be read as if it contained a direction, that the legacy should be satisfied out of every part of the assets ratably, i. e. if the assets consisted of 10,000*l.* secured on mortgage, and 10,000*l.* in government securities, the bequest must be read as if it had in terms directed one moiety to be satisfied out of the mortgages, and the other moiety out of the government securities. Such a bequest is in express terms made void by the 3d section of the statute as to one moiety. But this doctrine is inapplicable to the case of a person claiming under a voluntary deed of covenant. When it is said that such a deed is in the nature of a legacy, no more is meant than that it is not to come into competition with the claims of creditors; it has precedence of all legacies unless where, as in the present case, it is by express provision postponed to them; but when its priority in point of administration is ascertained, it must be satisfied as a debt. Supposing the covenant to be valid at law, the executors might, without action, pay the money to the covenantors, or they might be compelled to pay it by action.
* 653 When the money should thus come to * the hands of the covenantees, on what trusts would they hold it? Surely on the trusts expressed in the deeds. They certainly could not retain it for their own use, and I can discover no *cestuis que trust* except those entitled under the deed.

The argument of the appellant, if sound, cannot be confined to

voluntary deeds, it would be equally good if the deeds were on a valuable consideration. Suppose, for instance, that the covenant of this testator had been entered into in consideration of 20,000*l.* paid to him by a third person desirous of establishing the charity, the doctrine arising from the voluntary nature of the instrument would be inapplicable, but the argument as to the fund out of which the covenant would have to be satisfied would be the same as it is now; and this would be the case even if the covenant had been to pay the money in the lifetime of the covenantor, and default had been made in payment. This would constitute a debt at the decease of the covenantor, to satisfy which there might be no assets except those affecting land. Surely it could not be argued that payment of such a debt could be resisted. There is no privity, if I may use such an expression, between a creditor and the various portions of the estate of the testator, from which the executor obtains the means of paying the debt. And it is, I presume, on this ground that personal unsecured debts due to a testator are always classed under the head of his pure personalty, though if any of his debtors are dead, the executors of those debtors may be obliged to recur to real securities in order to obtain the means of payment.

If a testator, whose assets consist exclusively of a bond due from a deceased obligor, should have made a charitable bequest, that bequest would be good, even though the assets of the testator could only be realized by resorting to * the real estate * 654 of his debtor. The case of *Foone* v. *Blount*[1] affords a strong analogy in favour of this view of the matter.

It was argued, that by supporting this decree we should be enabling all persons to defeat the salutary provisions of the Statute of Geo. II.; but I do not think that is so. The only object of the statute, so far as can be collected from its language, is, to prevent the improvident gift of lands to charitable uses; but the enforcing of this deed of covenant has no tendency to subject land to any charitable uses. It may oblige the executors to convert real securities into money in order to pay a debt, which the creditor, receiving payment, will be bound to settle to charitable uses; but it cannot by possibility operate on the land itself. If it is said that the decisions on the statute show that a gift of money pro-

[1] Cowp. 464.

duced by sale of land, or a gift of real securities, or of money to be realized by means of real securities, is prohibited no less than a gift of the land itself, I answer, that is because such a gift has been decided to be, as it no doubt is, the gift of a charge on land which is expressly made void by the 3d section of the statute. This cannot, in my opinion, as I have already stated, be said of the deed now under consideration.

On the second argument of this case we had the assistance of six of Her Majesty's Judges; but unfortunately they are equally divided in their opinions. Three of them concur in opinion with the Lords Justices and the two learned Judges who assisted them; the other three differ, being of opinion, that the sum covenanted to be paid is not now payable from the proceeds of the chattels real. This difference of opinion existing, your Lordships cannot rest your decision on the authority of the learned per-
* 655 sons * whom you call in to assist you. But looking to the reasons which they have given, I am bound to say that I see nothing in them to lead me to distrust the accuracy of the opinion I have expressed. There could be no valid plea to an action on the covenant, so as at least it seems to me, and as pointed out by Mr. Justice Willes, a Court of law has no power or machinery enabling it to arrest the execution, so far as, in order to satisfy the judgment, the executor might be obliged to resort to the chattels real.

I have, therefore, the misfortune to differ in opinion with my noble and learned friend, the Lord Chancellor. I think the judgment below was right and ought to be affirmed.

Lord St. Leonards. — My Lords, in this case I have heard the second argument, although I was not present at the first, and, considering the great difference of opinion which prevails between my noble and learned friends in the House and the learned Judges who were called in to advise your Lordships, I have of course considered the case with great anxiety. I am bound to say that that anxiety does not arise from any real difficulty which I myself feel, but from the great respect and deference which I naturally feel for the opinions of the learned persons from whom, either on the one side or the other, I must differ.

My Lords, I cannot adopt the view of my noble and learned friend on my right (Lord Cranworth) as regards the intention of

the enactment of 9 Geo. 2, c. 36, for I think that though the preamble (whatever weight in strictness of law may be given to it) may be considered as certainly not very accurately expressed, yet it is impossible to entertain any doubt upon the real meaning of the statute so far as the preamble is concerned. "Whereas gifts or alienations * of lands, tenements, or hereditaments * 656 in mortmain are prohibited or restrained by Magna Charta and divers other wholesome laws, as prejudicial to and against the common utility, nevertheless this public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths to the disherison of their lawful heirs, for remedy whereof." Remedy for what? Not simply those things that were struck at by Magna Charta and other wholesome laws, but for additional mischiefs which had been introduced by alienations or dispositions to charitable uses to the disherison of lawful heirs, and therefore, in point of fact, the preamble, although there is perhaps some little inaccuracy in it, does fit the Act and its enactments. And I think that nothing can be more express or explicit than its declarations.

It is impossible to find any section in a statute framed in more express terms than the 1st section of this Act. One would have thought that no question could ever arise as to what was included or omitted, because there is scarcely a word in the English language applicable to the subject which is not employed in it, in order to express the clear intention. Now, from the decisions, we know that that has been applied to chattels real, for example, which is the question now before your Lordships, and to "any interest in land." And the words are such, that they certainly would apply to almost any mode of attempting to do those things against which the Act is directed. I cannot conceive any mode of attempting it, that would not fall within some of these words. It must not be a gift, it must not be a grant, it must not be an alienation, it must not be a limitation, it must not be a release, it must not be a transfer, it must not be an assignment, or appointment, or a * conveyance, or settlement of any sort. What * 657 is there which can be conceived to operate upon property which does not fall within some one of these prohibitions? It appears to me to admit of no doubt.

Then when we come to the 3d section, we find it is quite consistent with the 1st, "That all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments," and so on. Any gifts, grants, &c., which shall be contrary to the 1st section, shall be absolutely void. So that the statute expressly prohibits the thing from being done, and then makes absolutely void the attempt to do it.

If you look at what this testator has done, you will find that, upon the evidence before us, his clear intention was to evade one Act, the Legacy Duty Act, and to violate another, the Mortmain Act.

The indenture upon which the question has arisen is of course connected with the will, and we must take them both together, for he refers to the dispositions which may be made by his will, and, therefore, the will operates in point of fact upon the deed. They were found together; they were executed at the same time; they were intended as one conveyance, and to have one operation. In my opinion the intention and the true construction of this instrument is, that it is a voluntary settlement of so much as the testator has directed of his personal estate (the nature of which I will presently consider) to be secured by this deed in anticipation of his will. Equity, in the case of a bond to settle a certain sum of money, does not regard the penalty or the nature of the
* 658 security, but it looks to the * act which was intended to be performed; and, therefore, the condition of a bond has frequently been considered and acted upon as an agreement for a settlement. Now the Act of Parliament expressly strikes at a settlement made in any way, attempting to charge property or to transmit property of the nature of chattels real to a charitable use. The testator was perfectly aware of the statute. We see by the evidence that he had very great assistance, particularly of a gentleman at the bar who had, we know, written upon the very subject of assets, and was, therefore, very competent to advise him, although he seems to have hazarded — what, when I was at the bar, I always declined to do — an attempt to violate an Act of Parliament.

Now the way in which his intention appears is clearly this: By

the deed itself he recites, that for the purpose which he has in view, he desires to settle and assure a part of his personal estate. He himself, therefore, tells you that his object is to settle a portion of the estate. And then, when he comes to deal with the money which he intends to provide, he very carefully desires his executors to put it into the three per cents, and if they should change the securities, he particularly desires that they should be careful that it should be legally laid out or invested in other securities. He knew, therefore, the danger he was in from the statute he was attempting to violate.

Now, when he comes to his will, you find that he was perfectly aware of the distinction which has been referred to, on this point, in the nature of assets. He gives by his will, expressly, certain charitable legacies, and he directs that all those charitable legacies shall be paid out of such part only of his personal estate as shall not consist of chattels real, for the purposes of a charitable institution. He knew, therefore, what the statute made illegal, and he * provided distinctly against an application of his * 659 money which he knew would be illegal under the statute.

Then the paper which is found with the will, and which is signed by himself, is prepared by Mr. Ram, the gentleman to whom I have referred, and he there tells you that the deeds of covenant would create a debt upon his assets; and then he states: "Mr. Ram considered that although the covenant is to place out in the three per cents a sufficient sum to pay the annuities, yet there would be no objection to let a sufficient sum remain of the mortgages for those purposes, from which better interest could be obtained than by buying into the funds." It is clear, therefore, according to this evidence, that he meant specifically that these very mortgages should remain after his death a fund to answer the charitable uses.

We have, therefore, to consider what is the operation of that particular provision. Supposing he had attempted by his will to settle these particular chattels real to charitable uses. Of course there is no question there; everybody would agree at once that that would be illegal. Can he then do indirectly what he could not do directly? and can his attempt be successful or not?

Now, my noble and learned friend on my right has referred to the operation of the covenant at law, and referring to the opinion of one of the learned Judges, of which opinion he approves, he thinks that because an action of covenant at law could be main-

that deed bound nobody in nothing. And I believe that is pretty well its proper description. The deed in the first place does not at all bind the donor (if he can be so called) during his lifetime. It does not bind his property at all during his lifetime. At his death it does not bind his property, nor any part of it, if he chooses to dispose of it either *inter vivos* or by testamentary disposition; and if it is to come into play at all, it is not to do so against his assets until all other obligations, debts, and even legacies are paid; not merely legacies that he had given, but legacies which he might give; every one of them is to be satisfied before any part of the personal estate is to be appropriated to the payment of this charge. I do not speak of this as a deed which he locked up and kept in his custody from the notice of others. I am content to treat it as a legal obligation, but it is a legal obligation that does not bind either him or his property. And the only way in which you can look at it fairly is this: that if sufficient property was permitted to remain to answer it, then, according to his view, this deed should operate as a deed directing charities.

So far as the deed directs charities, if any funds should * 663 ever come to be * enjoyed by the charity trustees, that deed will be perfectly valid; but so far as it attempts to bind any portion of the property which the law says shall not be converted to charitable uses, it is simply void. In the case which I have cited, the intention was clearly to bind all the property of the testator, as far as a judgment could bind it, at the very moment of the judgment being acted upon; and yet that wholly failed by the rule of law. Here the testator does no such thing, for he provides most explicitly, by the deed, that his property is not in any manner to be affected until all his debts, of every description, and all his legacies, are paid. He goes beyond the decision of the Court of Equity. You need not trouble yourself with the rule of the Court of Equity, for he goes beyond that rule. He does not stop at the payment of debts, and then create a voluntary obligation as against legacies, but he takes debts and legacies, and postpones this voluntary donation till every other gift and disposition, present or future, is satisfied.

Then, if that be the nature of this deed, looking at the rule of the Court of Equity, and this House is now sitting as a Court of equity in this matter, I clearly come to the conclusion that this deed cannot be supported as against chattels real. This is cer-

tainly, as I have already stated, a simple question for the Court of Equity. That Court has the administration of assets, and I rather doubt whether the House was quite correct in proposing the questions which it did to the Judges. It manifestly puzzled the Judges uncommonly, for, although they were told to assume that the deed was a valid deed, yet they naturally said, How far are we to assume the deed to be a valid deed, and for what purpose is it absolute? And when they came to give their opinions, they found themselves inevitably driven to consider the effect of the statute upon * the deed itself. It was impossible that they should * 664 not do so. And then, when you come to the question of assets, a Court of law has nothing whatever to do with the marshalling of assets, or with the administration of assets in a general sense, such as belongs to a Court of equity. Therefore, of course, the point could not properly arise before the common law Judges. And that may account for, and probably is the reason, why there were such direct differences of opinion between those learned Judges.

It comes then, my Lords, at last to this: Looking at the gift by this deed, considering it as a valid deed, and as binding upon such parts of the personal estate, as in the case of a legacy to a charitable use would be answerable to pay that legacy, how does the matter now stand? As an intended charge, or as an indirect charge, upon these identical chattels real, in violation of the statute, I think the attempt is perfectly fruitless. But if we look at the matter as it stands, in point of administration of assets nothing can be more simple; the law of the Court of Equity is so perfectly clear upon that subject. We all know that if a legacy is given to a charitable use generally, when the Court comes to deal with the assets, it has become the settled rule of the Court, after some difference of opinion, and is now a rule which no one can disturb, that in the administration of assets you cannot, in the case of a legacy to a charity, have a marshalling of the assets as you would have in the case of other legacies, so as to let the charitable legacy be thrown wholly, or as far as it could be thrown, upon the pure personalty. I ask your Lordships to consider, Does or does not the gift by this deed, as the rule of equity stands, putting it on the highest ground on which you can place it, amount simply to a legacy, a legacy secured or directed by a deed, but still a legacy in the creation of it, a legacy in the gift of it, a

* 665 * legacy in the administration of assets for the payment of it, a legacy in all characters and qualities that it can possibly have? Well, then, what follows? Why, that every gift to a charitable use out of personal estate binds the whole personal estate. You take it as it is given, and it is payable out of the entire personal estate. Then you have to consider, whether you can apply the whole of the personal estate *pro ratâ* to the payment of that particular legacy. The statute forbids it. Well, if the statute forbids it, what have you to do? Marshalling the assets for this purpose is entirely out of the question, because that is a settled rule which nobody can alter. Then, if there can be no marshalling the assets for this purpose, can it be paid out of the chattels real? In this instance there is no other source; clearly and unquestionably it cannot. To pay out of the chattels real would, in my opinion, be a direct violation of the Statute of Mortmain. I consider the attempt that has been made a mere flimsy and unsuccessful endeavour to evade the statute. I think it would have been very mischievous if it had succeeded. And I think we are bound to prevent a very useful Act of Parliament from being got rid of by a side wind. But, of course, we must decide according to the rule of law.

I think there is a great mistake prevailing with respect to the policy of the Act of Mortmain. As far as my impression goes, I may be wrong, but I always thought it one of the wisest Acts that ever was passed. It does not take from any man the power of disposing of any portion of his property, but it does take from him that power, so liable to abuse, which many men, from mere personal vanity, or weakness at the last moment, would make use of, to the prejudice of those who would be entitled to suc-
* 666 ceed them. I think it, therefore, a very * wise Act of Parliament, and I should be very reluctant to allow it to be put aside by any such attempt as this.

I have been impressed as much as any noble Lord in the House with the weight of the opinions of those from whom I differ; but, at the same time while I know that, whichever way my opinion happens to go, I must differ from learned persons for whom I have the greatest respect, I have also the satisfaction of knowing that I agree with an equal number of persons for whom I have an equal respect. Standing, therefore, in that position, having given my best attention to the case, I take the same view as my noble and

learned friend on the Woolsack, and say, that this judgment ought to be reversed.

LORD WENSLEYDALE. — My Lords, I regret that there is a difference of opinion amongst the noble and learned Lords who have to advise your Lordships on the present occasion. That circumstance naturally causes me to feel less confidence in the opinion which I have formed; but it has also caused me to give the greatest consideration in my power to the case; and I have satisfied myself that the opinions given by the learned Judges, Mr. Justice Wightman and Mr. Justice Erle, to the Lords Justices, and their Lordships' judgment in conformity with those opinions, and those of the learned Judges who have favored us with theirs, Mr. Justice Williams, Mr. Justice Willes, and Mr. Justice Blackburn, are right, and that the judgment appealed against ought to be confirmed.

The facts give rise to two questions: first, whether the indenture of the 12th August, 1846, called the charity deed, was of a testamentary character. And if not, secondly, whether as a deed it is avoided or rendered ineffectual * by the operation * 667 of 9 Geo. 2, c. 36, so far as it is necessary to resort to the real estate, or estate of a real nature, to satisfy the covenant contained in it.

Upon the first question, I believe, none of their Lordships has any doubt. The instrument is clearly not testamentary, and if it was so, its effect and operation need not be discussed, for no effect could have been given to it until it had been admitted to probate.

It remains, therefore, to consider the second and very important question, with the great assistance we have had from the very able arguments at the bar. What is the nature of that instrument?

So far as we regard the instrument itself, it had unquestionably a present operation. It absolutely bound the deceased the moment it was executed, though never handed over to the covenantees. And if the covenant contained in it had been such that it could be broken in his lifetime, and it had been broken in his lifetime, and the covenantees had got possession of the instrument, or even without, they could have brought an action upon it against him. It was a binding instrument under seal, being once sealed and delivered. For this the case of *Doe* d. *Garnons* v. *Knight* [1] was

[1] 5 B. & C. 671–689.

cited, and a great many others might be added; that the formal sealing and delivery make it a complete deed, though it be retained in the possession of the party bound.

If the deed is to be construed according to its legal effect, to be collected from the instrument alone, it is impossible to say that it is void, either altogether or in part, by the Statute of 9 Geo. 2, c. 36. Far as the decisions upon this statute have gone (for, as Mr. Jarman observes,[1] the spirit of no legislative enactment was ever more vigorously and zealously seconded by the judicature * 668 than this), * yet none has gone so far as to afford a ground for holding that a mere covenant to pay money is avoided by the Act. The question is not whether such a covenant is against the spirit of the Act, or has a tendency to produce a violation of it, or is an evasion of the Act. The true question is, whether it is a violation of the Act, and struck at by it.

A covenant to pay a sum of money at a future day, looking at the words of the instrument alone, is not, correctly speaking, even a gift of the money, still less is it a gift of any lands and tenements, or a charge upon such; for a mere specialty is of itself no charge upon lands as a judgment, nor upon real or personal chattels; nor is it a gift or transfer of any charge or incumbrance affecting the same. It is very important to keep this constantly in view; for, with the greatest respect to my noble and learned friends, whose opinions I have had communicated to me, those opinions seem to rest very much upon what appears to me to be a loose and inaccurate use of the word "gift" as applicable to the subject which may be taken under an execution founded on the covenant. In my judgment it is no gift at all in the proper use of the term. The covenant might be discharged by investing 60,000*l.* in the deceased's lifetime, which might last many years, or after his death. It was quite uncertain whether any part of the real estate would ever be wanted to be sold in the deceased's lifetime, or after his death, in order to raise any part of the 60,000*l.*; and equally uncertain whether any action would have to be brought to recover damages for the breach of the covenant, or any effects of a real nature would be taken in execution, and sold under legal process if it became necessary to bring such an action.

It appears to me, therefore, to be impossible to hold, that

[1] 1 Jarm. on Wills, ch. 9.

if this covenant is considered to be no more than what * it * 669 purports on the face of the instrument to be, it can be prohibited by the Act. It was not in its inception, as far as appears from the instrument itself, against the Mortmain Act, and therefore void.

Nor, if you adopt the principle, that every man is to be supposed to contemplate that which is the necessary result, or the one reasonably to be expected in the circumstances of the case, of the act he does, is it possible to say, that the deceased meant the real estate to be given or charged; for such was certainly not the necessary result; nor have we any means of knowing that it was to be reasonably expected, considering the uncertain and undefined time allowed for the performance of the covenant, which he might fulfil in his lifetime, or his executors after his death. And what the state of the property would be after his death, which might not occur for years afterwards, was, at the time the deed was executed, totally uncertain. From the instrument itself, therefore, it is impossible to conclude that the real estate of the deceased was intended to be given in satisfaction of the covenant, or charged, and therefore the deed, thus far, was no gift of or charge upon it.

But if it could be shown that the real intention of the parties to such an instrument was different from that expressed, and was to affect the real estate, and the instrument was only a contrivance, or, as it is usually said machinery, to effect the object of taking the mortgage terms and handing them over to the trustees, it might be treated as in effect a gift or charge upon the real estate; and being such it would be avoided by the statute. On this principle the cases of *Doe* v. *Carter*[1] and *Flight* v. *Salter*[2] were well decided; and the law was so laid down in that of *Croft* v. *Lumley*,[3] in this House, where the * giving a warrant of attorney, * 670 though not a charge itself, was held to be capable of being construed to be a charging and incumbering, if it was really meant to be immediately acted upon by entering up judgment, but not otherwise. If this intent were made out, the covenant would be avoided to the extent to which it was meant to be a gift or charge on the real estates, the mortgage trust.

But in this case there is not the slightest evidence that such was the intention of the covenantor. All depends in this respect upon

[1] 8 T. R. 57, 300. [2] 1 B. & Ad. 673. [3] 6 H. L. Cas. 672.

his intention, for there was no other party to the arrangement; and it by no means appears that he wished the real estate, or had any interest in wishing it, to go into the hands of the charity trustees. For any thing that appears to the contrary, it was perfectly indifferent to him in what way the money was raised, which was to be paid for the purchase of the 60,000*l.* consols. There is no evidence of any intention contrary to the terms of the deed.

With all due respect to the opinions of the learned Judges, my brothers Wilde and Byles, who have given their opinions that the deed is void, I cannot help thinking that they have acted upon mere surmise and suspicion only, and not upon evidence. In my opinion there is really no evidence whatever of an intention that the mortgage should be transferred to the trustees. I cannot have the least doubt in my mind that it never formed any part of the plan of Mr. Brame to do more than to cause 60,000*l.* consols to be purchased in the names of trustees. That the terms of years were to be handed over to them in specie, never formed a part of his design. There is no reason whatever why it should have been. They might or might not be intended to be sold by the executors for that purpose. The probability is that he intended to evade the payment of ten per cent. for legacy duties, — in- * 671 deed that * appears from his own declaration in a paper found with the instruments. Whether he has successfully done so, or whether the trustees are liable under the Act imposing succession duty, is an inquiry wholly immaterial in the present case. It appears also from the same memorandum, that he did not mean to sell the mortgage terms himself, but to keep them in order to get better interest. But there is nothing whatever to show that he meant them not to be sold, but kept by his executors.

I must own that I cannot bring myself to feel any doubt upon the validity of the deed in its inception, notwithstanding the opinions of the learned Judges to which I have referred, and those I have heard from some of my noble and learned friends.

I am of opinion, therefore, that the deed is not avoided in any respect as being a gift of or charge on lands, or a gift of a charge on land, forbidden by the 9 Geo. 2, c. 36.

But it is said that this covenant to pay a sum of money, being without consideration, and being obligatory only to pay after death (for until twelve months after the covenantor's death no action

could be brought), and then being to be paid without prejudice to the payment out of the estate of the deceased of funeral expenses, debts, legacies, and other charges enumerated in the indenture, the effect of the covenant was to give the debt the character of a legacy; and that if it is justly so to be considered, then it ought to be paid on the footing of a legacy to charity, which would be paid only out of the pure personalty belonging to the testator, and in favour of which no marshalling of assets would be allowed, according to a series of decisions on the statute which it is impossible to dispute, and which beyond doubt must be followed.

There is no question but this debt by specialty being * purely voluntary, all debts upon a valid consideration * 672 would take precedence of it whether by specialty or not.

In the case of *Fairbeard* v. *Bowers*,[1] a voluntary bond and judgment for 500*l.* to be paid after the death of the obligor, and to be divided between his three natural children, was held to be in the nature of a legacy, and to be postponed to debts and the widow's customary part in London. The expression, that a voluntary deed creating a debt was in the nature of a legacy, which is repeated in another case of *Loeffes* v. *Lewen*,[2] does not mean that it is to be treated for all purposes as a legacy, but merely that it is to be postponed as a legacy is, to all debts upon good consideration. And one of the Lords Commissioners, Rawlinson, thought that the judgment should be paid before other legacies, if there were any. And it has been now fully settled that a voluntary bond shall not be paid in a course of administration so as to take place of real debts, though by simple contract, but such voluntary bond shall be paid before legacies; *Jones* v. *Powell*.[3]

This being the undoubted law, the covenant is, I think, to be treated merely as a debt, not as a legacy; but it is a debt not payable unless the assets of the deceased turned out to be sufficient to pay all the debts and charges mentioned in the deed; for that is a condition precedent. If they did, the debt was to be paid; but if that debt gave no lien on the assets of any sort, no part of them could be considered the property of the testator, in law or equity. When they were sold, and the money invested in the funds, the stock became the property of the trustees; and if the money was not paid, and an action were brought for breach

[1] Prec. in Ch. 17. [2] Prec. in Ch. 370. [3] 1 Eq. Cas. Abr. 84.

of the covenant, the damages recovered would become their
* 673 * property also; but there was no property, legal or equitable before. In this respect there is an important difference between this case and those cases where lands are devised to be sold, and the proceeds paid to a charity. In those cases, before the lands are sold, the charity has an equitable interest in them. The bequest constitutes a charge, and that charge by the 3d section of the statute is void. Such is the case of the *Attorney-General* v. *Lord Weymouth*.[1] Lord Hardwicke there says: "The direction to sell and pay the proceeds gives an interest in the meantime in the rents and profits, and a devise of the rents and profits is a devise of the lands themselves." But a creditor by specialty has no charge on the assets. He has no claim, if those assets are chattels real, upon any part of them. As soon as the money is paid, either in discharge of the liability on the covenant without suit, or in discharge of the damages after suit, the creditor has an interest in the money, but none whatever before that time.

In my opinion the indenture, looking at it alone, does not give or charge any chattels real, or chattels savouring of realty. I think there is no evidence whatever to show that the true intention of the covenantor was different from the avowed one, so as to enable a Court to hold that the instrument was a contrivance to effect that purpose; and lastly, this is not a case of a gift or legacy to be paid out of assets, to which none of those of a real nature would be applied according to the established rule. The sum of money to be paid is nothing more than a payment in discharge of a debt, and the charity trustees are creditors, not legatees, and are not disqualified to receive such payment, on the principle laid down in the case of *Foone* v. *Blount*.[2]

* 674 * Whether the result of this decision, if made as I think it ought to be, will be that the Statute of 9 Geo. 2, c. 36, will be extensively evaded or not, and its operation in defeating charitable donations restricted, and whether, if such should be the effect, it would be a public mischief, I think it unnecessary to inquire. There are certainly not wanting opinions that the mischief would not be great (see Jarman on Wills, ch. 9, 211 n.). But our duty is not to inquire into those speculations, but simply to decide whether this transaction is prohibited by the Act; and I have come to the conclusion that it is not.

[1] Ambl. 20. [2] Cowp. 464.

LORD KINGSDOWN.—My Lords, two principal questions have been raised in this case: 1st, whether the instrument dated the 12th August, 1846, and purporting to be made between Benjamin Brame on the one part, and certain gentlemen of the name of Alexander on the other part, is a valid deed, or is properly to be regarded as testamentary, and therefore of no effect until it shall have been admitted to probate; 2d, whether if valid as a deed, the sum of 60,000*l.*, which it professes to secure to the covenantees, is a debt to be paid out of the assets of the covenantor, or whether that sum is to be regarded as a gift to charitable purposes, and to be dealt with as a legacy, in which case the gift will fail to the extent of the proportion which the mortgages or chattels real bear to the pure personalty.

On the first point no difference of opinion, I believe, prevails amongst your Lordships. But this leaves the great question in the case quite untouched. Allowing the indenture to be a valid deed, is it a deed of gift, or a deed creating a debt, to the payment of which all the assets of the maker of the deed are liable?

It is contended by the appellants, 1st, That this deed * creates no obligation on which any action could be brought * 675 against the maker in his lifetime: that no breach of covenant could occur until twelve months after the death of the maker of the deed. No argument was offered against this construction by the counsel for the respondents, and it appears to me to be the true one. The obligation, therefore, whatever its true effect, is one to be enforced only against the assets of the maker. 2d, It is contended by the appellants that it is merely a voluntary deed; the sum secured by the covenant is mere bounty on the part of the maker, it is founded on no contract with the covenantees; the maker of the deed receives no valuable consideration for it of any kind; he enters into the obligation, as he declares, merely for the purpose of executing his own charitable intentions. 3d, It is an obligation which it depends upon the maker himself to defeat by any disposition either *inter vivos*, or testamentary, just as it may seem good to him.

Not only the sum expressed in the deed is not to be preferred to legacies, but it is not even to be on a par with legacies. It is to be postponed to all legacies. It is, in truth, a mere engagement by the covenantor to let the charities take the benefit of the general residue of his estate to the extent of 60,000*l.*, if he does not

dispose of such residue to any other purposes. The charities are merely substituted for the heir at law and next of kin. A residuary bequest or a voluntary disposition of the residue by deed would defeat the effect of the covenant.

That under such circumstances the sum mentioned in the deed, though in form a debt is in substance a legacy, seems to be settled by the case of *Fairbeard* v. *Bowers*, referred to by my learned friend opposite. Bowers, a citizen of London, executed a bond for 1000*l.*, conditioned for the payment of 500*l.* within six
* 676 months after his death, for the benefit of * three natural children. He afterwards confessed a judgment on the bond subject to the same defeasance. By the custom of London, the widow was entitled on her husband's death to a moiety of his personal estate after payment of his debts and funeral expenses. She insisted that there was no consideration for the judgment, and that it was not a debt to which the estate was subject. The case was heard before Lords Commissioners, and the whole Court was of opinion "That there was no consideration for entering into a bond or judgment, and, therefore, being to be paid after Bowers' death, they reckoned it to be in the nature of a legacy, and that all Bowers' debts and the widow's customary part should take place before it, and that it should be satisfied out of the intestate's customary part." Lord Commissioner Rawlinson expressed an opinion that if there had been legacies given by Bowers the judgment should have been paid before other legacies, but he treated it as a legacy, though a legacy entitled to a priority over others. None of the Judges of course intended by the use of that term to express that the bond or judgment was testamentary; all they meant was, that the sum secured was to be treated, not as a debt, but as a mere gift, to be paid on the same footing with a legacy. They held that though in point of form it was a debt, in substance it was a legacy.

In what proper sense of the expression it is possible to consider as a debt a sum of money of which payment can neither be compelled against the supposed debtor, in his lifetime, nor against his assets after his death, unless he thinks fit to make no other disposition of those assets by any disposition, either *inter vivos* or testamentary, I am at a loss to understand.

If it is in effect a gift, it can make no difference whether the gift is made by deed or by will. If it would be a violation

of the Statute of 9 Geo. 2, c. 36, to permit it to * take effect * 677
against real estate in the one case, it must equally be so in the other.

What then is the construction settled by a long series of authorities, and acted upon now without any controversy or question, as the established familiar practice of the Court of Chancery? It is no doubt the professed object of the statutes to prevent either land, or the produce of or any interest in land, from being devoted to charity, except in a particular form, and to prevent money devoted to charity from being invested in lands; and it might be contended, if it was *res integra*, that where a testator bequeaths a general legacy of money to a charity, he neither gives land, nor any interest in land, to the charity, nor directs a charitable legacy to be invested in land, or on security of land, though a part of his assets may consist of chattels real. But, inasmuch as a legacy given generally is to be paid out of the general assets, and if the general assets consist in part of chattels real, those portions are equally applicable with the other personal assets to discharge the gift, it is settled that, to make such application of them is to give an interest in land within the meaning of the statute, and is therefore a violation of its provisions.

The gift is not more a violation of the statute because it is made by a testamentary paper than if it be made by deed affecting the same assets; if the legacy is an appropriation of the assets of the testator, so is a gift which affects only the assets.

Again, the ordinary rule of a Court of equity is that, in order to do justice in the administration of assets, if one creditor or legatee has two funds to which he can resort, and another only one, the Court will so marshal the assets that the creditor who has the two funds shall be paid, if it be necessary, out of that fund to which the other cannot resort; or, at all events, that the latter shall have * recourse against that fund on which * 678
he has no immediate claim, to the extent to which the other creditor or legatee might have come upon it, for satisfaction of his demand. It might, perhaps, have been held, without infringing the statute, that this rule might be applied to charities, and that where there is pure personalty, to which alone the charity can resort, and other personal estate out of which other legatees may be paid, the pure personalty should be applied in discharge of that legacy. This seems at one time to have been allowed; but

the rule has been long altered, and it has been settled that such a marshalling would be, indirectly, a violation of the statute, by permitting a portion of the assets, which the law would not allow to be given to charities, to be appointed in discharge of a legacy directed to be devoted to that purpose.

To me, therefore, it appears that upon the plain language of the statute, interpreted, as it must be, by settled rules of construction, the deed in question is, in effect, an attempted appropriation of the assets of the testator, after his death, to charitable purposes; and that, to the extent of real estate and of chattels real, the law will not permit such appropriation, and that the gift must fail. In my view, it is not merely a contrivance to evade the statute and defeat the policy of the law, but the mode of doing it, the act, as well as the intention, is in the teeth of the statute.

It is little to be regretted that such an attempt should fail. I cannot but think that if this device is to take effect, the Statute of 9 Geo. 2, c. 36, as far as it seeks to prevent the application of the produce of lands and chattels real to charities, except by deed enrolled twelve months before the death of the testator, becomes a dead letter. Every mischief against which the Act is intended to guard is, in that respect, let in; it is an attempt to do indi- * 679 rectly * what the law will not allow to be done directly. The statute is not a penal one, but an Act for the protection alike of the individual and of the public, and it should, I think, receive such a construction as will give it full effect.

If, therefore, the deed now under consideration had been far less directly within the terms of the statute than it seems to me to be, I should think that the Court ought on this ground to refuse it effect.

The learned Judges who assisted the Lords Justices appear to confine their attention to the first clause of the statute, which provides that no lands or hereditaments, and no personal estate to be laid out on or secured on lands and hereditaments, shall be given to charities. They then say, that if the indenture had purported to convey or charge or incumber any of the chattels real of the settler, it would have been void *pro tanto;* but that it has no such object, that it does not charge any existing property, and that the settler might have disposed of all his chattels real in his lifetime, and that his executors might have done the same. They conclude with saying, " We are, therefore, of opinion, that as the

deed in question does not, and did not when made, operate as a charge or incumbrance on any real estate or chattels real for the benefit of any charitable use, it is not affected by the Statute of Mortmain, and is consequently valid."

But with great and most unfeigned respect for those learned persons, I cannot help thinking that it is on the third clause, rather than on the first, that the argument, not against the deed, about the validity of which there is no question, but against the extent to which it is attempted to enforce it against the assets, depends. The third clause provides that all gifts and grants of any estate or interest in land, or of any charge or incumbrance on land, in trust for any charitable uses whatever, unless in the form prescribed by * the Act, shall be void. The ques- * 680 tion is, whether a gift to be made effectual out of interests in lands, is or is not equivalent, in the construction of the statute, to a gift of those interests in lands. It is quite settled that this is so as regards gifts by will. The learned Judges, in referring to *Collinson* v. *Pater*,[1] observe that in all the cases the devise or conveyance in question operated directly upon something which was a chattel real or charge upon real estate. But in that very case, the gift was not of the judgment debt specifically to the charity; it was a general bequest to executors, with a direction to get in debts, realise the assets, and invest the residue for charitable purposes.

The common case of a pecuniary legacy, given without the least reference to the state of the assets, fails to the extent in which the assets consist of chattels real, not because the devise to the charity operates directly on the chattels real, but because, in the ordinary legal administration of the assets, chattels real would be applied to the payment of the legacy.

Again, which is still more important, the Judges do not think it important to determine whether the covenant could have been enforced against the settler in his lifetime, or not. But this seems to me of the very essence of the case. If a legacy be an appropriation of the assets as they exist at the death, why is a voluntary engagement to pay out of assets which may remain after legacies are satisfied, less an appropriation? Neither the Judges nor the Lords Justices deal with this question, or with the applicability of the rule as to legacies to deeds of gift. The question seems to

[1] 2 Russ. & M. 344.

have been presented to them as affecting the validity of the
* 681 deed, and as if the necessary * consequence of affirming
the validity of the deed was to constitute the covenantees creditors of the settler, with all the ordinary rights of creditors.

Upon the whole, I have arrived at the conclusion that the decree complained of must be reversed.

Mr. Roundell Palmer. — Perhaps your Lordships will allow me to make an observation with regard to the costs of the appeal. I presume that your Lordships will think it right that the costs of the appeal on both sides should come out of the general estate, having regard to the nature of the question, and to the fact that the difficulty has been created by the testator.

LORD ST. LEONARDS. — The difficulty has been created by the testator himself, and, therefore, I think the costs should come out of the estate.

THE LORD CHANCELLOR. — The cause will be remitted to the Court of Chancery, with the declaration that has been proposed, and the costs of all parties will be paid out of the estate.

LORD CRANWORTH. — The costs both of the appeal and in the Courts below ?

LORD ST. LEONARDS. — We do not deal with the costs below.

Mr. Roundell Palmer. — I understand that your Lordships do not vary the decree below in that respect.

It was afterwards ordered, that the decrees below be reversed; and that the sum of 60,000*l.*, mentioned in the "Charity Foundation Deed," dated 12th August, 1846, is not payable from the proceeds of the chattels real of the covenantor. Costs of all parties to the appeal to be paid out of the estate. Cause remitted with this declaration.

Lords' Journals, 30th July, 1860.

* YOUNG v. BILLITER. * 682

1860. June 25, 26; July 6; August 8.

HEATHFIELD YOUNG, *Plaintiff in Error.*
RICHARD H. BILLITER, *Defendant in Error.*

Warrant of Attorney. "Fraudulent and Void." 1 & 2 Vict. c. 110. Assignee. Trover. Pleading. Practice. Venire de Novo.

The words "fraudulent and void as against the assignee of such" persons contained in the 59th section of the 1 & 2 Vict. c. 110, § 59, do not mean fraudulent and void absolutely, but only as to the assignee, so that a transaction forbidden by that section, and declared "fraudulent and void as to the assignee" may be valid as to other persons.

Where therefore F., a debtor, intending to petition the Insolvent Debtors' Court, voluntarily gave Y., one of his creditors, a warrant of attorney on which Y. entered up judgment, and issued execution, and the sheriff seized and sold the goods; and F. afterwards presented his petition, and an assignee was appointed: —

Held, that the assignee could not treat the transaction as void from the beginning, and maintain trover against Y. on an alleged wrongful conversion at the time of the seizure.

The assignee brought trover, alleging in the first count, that the creditor Y. wrongfully deprived F. of the goods. Y. pleaded not guilty, and also the warrant of attorney and the execution under it. The assignee replied, that after the 1 & 2 Vict. c. 110, and within three months before F.'s imprisonment, F., being in insolvent circumstances did, with the intent of petitioning the Court, &c., voluntarily, fraudulently, and contrary to the statute, charge his estate in favour of Y., a creditor, by means of a warrant of attorney, fraudulent and void within the statute, whereby Y. obtained execution, &c.: —

Held, that on this pleading trover was not maintainable against Y.

Quære. Whether under such circumstances as these there could be any form of action by which the assignee could obtain redress?

Quære, also, whether judgment having been entered for the plaintiff in the Court below, the House had power to do more (except by consent) than to reverse the judgment, and order a *venire de novo*?

THIS was an action of trover for goods, brought by Billiter, as the assignee of Flint. The first count alone is material to be stated. That count charged the defendant with converting, or disposing to his own use, or wrongfully depriving Flint, the

* 683 insolvent, of the goods in * the first count mentioned. The defendant pleaded several pleas, of which only two require to be noticed: not guilty; and, for a fourth plea, that before Flint became insolvent, the defendant recovered judgment against him, and took his goods in execution, and that such taking, and the sale thereof, were the conversion complained of. The replication to this fourth plea alleged, that after the 1 & 2 Vict. c. 110,[1] and within three months before Flint's imprisonment, he, Flint, being in insolvent circumstances, did, with the intent of petitioning the Court for the relief of insolvent debtors, voluntarily and fraudulently, and contrary to the statute, charge his estate in favour of Young, then being a creditor, by means of a warrant of attorney, fraudulent and void within the statute, whereby, and not otherwise, Young obtained the judgment and execution aforesaid, which were fraudulent and void.

The cause was tried at Lewes at the Spring Assizes of 1853, before Mr. Justice Coleridge, when it appeared that on the 20th February, 1852, Flint gave to Young a warrant of attorney to secure payment of 230*l.*, with interest, at a time specified; * 684 that on the 10th March, 1852, judgment * was signed on this warrant of attorney; on the 23d March, a *fi. fa.* was issued to levy 235*l.*; that the writ was delivered to the sheriff, who seized the goods on the following day, and sold them on the 26th; and on the 16th April made a return to the writ that he had levied 128*l.* 8*s.* 4*d.* On the 19th April, Flint was arrested by a creditor; on the 23d April he filed his petition; and on the 24th April the vesting order was made, vesting the estate of the insolvent in the provisional assignee. On the 5th June, 1852, Billiter

[1] 1 & 2 Vict. c. 110, § 59. "If any prisoner shall, before or after his imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, property, goods, or effects whatsoever, to any creditor, or to any person in trust for, or to or for the use, &c., of any creditor, every such conveyance, assignment, transfer, charge, delivery, and making over shall be deemed, and is hereby declared to be, fraudulent and void as against the provisional or other assignee or assignees of such prisoner appointed under this Act: Provided that no such conveyance, assignment, transfer, charge, delivery, or making over shall be so deemed fraudulent and void unless made within three months before the commencement of such imprisonment, or with the view or intention, by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his discharge from custody under this Act."

was appointed the creditors' assignee. No demand and refusal were proved, but this action was commenced on the 25th November, 1852. In the course of the trial, the plaintiff offered in evidence an adjudication of the Insolvent Court, by which Flint was remanded for one year for having charged or mortgaged his property fraudulently, with the intent of diminishing the sum to be divided among his creditors. The defendant's counsel objected to the contents of the adjudication being read, but the objection was overruled. The learned Judge left the case to the jury, on the question, whether the giving of the warrant of attorney was a voluntary preference; observing, that it was for the plaintiff to establish that fact, and that there was evidence upon it for the consideration of the jury. Exceptions were taken to the admission of the contents of the adjudication, and to the direction of the learned Judge. A verdict was found for the plaintiff, and judgment entered for him, after which proceedings in error were taken, and the judgment was affirmed in the Exchequer Chamber.[1] The case was then brought up to this House under the Common Law Procedure Act, 1852.

* The Judges were summoned, and Lord Chief Baron * 685 Pollock, Mr. Justice Wightman, Mr. Justice Williams, Mr. Justice Crompton, Mr. Baron Channell, and Mr. Justice Blackburn attended.

Mr. Vernon Harcourt for the plaintiff in error.—Trover is not maintainable here by the assignee. The person who alone can maintain it must have, at the time of the alleged conversion, the possession of the goods, or the right of possession; *Williams' Saunders.*[2] There was no such right in the insolvent at the time of the seizure, for he had voluntarily done that which was a mode of delivery of them to the creditor; and there was no such right in the assignee, for, until after the insolvency and the vesting order, the property of the insolvent did not vest in him, and when it did, there was nothing in the 1 & 2 Vict. c. 110, which operated by relation backwards, to give him any property in goods already disposed of by the insolvent. The security here was not void, but only voidable. The word "void" in a statute has often received such a construction; the *Lincoln*

[1] 6 Ellis & B. 1.

[2] Vol. 2, p. 47 *a*, 47 *k*.

College Case.[1] So in *Bryan* v. *Child*,[2] the words "null and void," in the 12 & 13 Vict. c. 106, § 137, received the construction of voidable only. But even if the words should be strictly construed, and the security be null and void, trover is not maintainable. The act done may be utterly void, but still there may not have been any wrongful conversion of the goods which were the subject of that act; *Horwood* v. *Smith*.[3] There property that had been stolen had been *bonâ fide* purchased in market overt by the defendant, and by him sold again, and it was held, that the defendant * 686 was not * liable in trover. In *Peer* v. *Humphrey*,[4] the defendant had *bonâ fide* purchased some stolen property, but as he did not purchase it in market overt, trover was held maintainable against him; but that was because no property had passed by the sale. Here it did pass, and the question is, whether what was complete and valid at the time can afterwards be in this manner rendered invalid. The judgment in *Stevenson* v. *Newnham*[5] shows that it cannot. In order to maintain trover, there must be some act of wrongful conversion at the moment; *Wilmshurst* v. *Bowker*,[6] *Nixon* v. *Jenkins*.[7] There was a period here during which the transfer was good, and the property had passed; the assignee, therefore, cannot claim it back in trover from the person who, at the moment he disposed of it, had a valid title to do so. In *Nicholson* v. *Gooch*,[8] a member of the Stock Exchange, under engagements with other members, wrote to the secretary to say that he could not fulfil his engagements; he was, accordingly, under the rules of the House, declared a defaulter, and the secretary received what was due to him from some members and distributed it among those to whom he was indebted; he was afterwards declared a bankrupt under the Act of 1849; but even under the Bankrupt Act it was held that the money thus distributed could not be recovered from the secretary as money had and received to the use of the assignees, for it did not bear that character at the time he received it. *Brook* v. *Mitchell*[9] establishes that nothing vests in the assignee at the moment the warrant of attorney is executed, but only from the time of the insol-

[1] 3 Rep. 53, 59 *b*.
[2] 5 Exch. 368.
[3] 2 T. R. 750.
[4] 2 A. & E. 495.
[5] 13 C. B. 285, 302.
[6] 5 Bing. N. C. 541.
[7] 2 H. Bl. 135.
[8] 5 Ellis & B. 999.
[9] 6 Bing. N. C. 349.

vency, and that the act done can only * be void as against * 687
those who, at the time of its being done, had the right to
the possession of the property.

This case ought to be left, as was suggested in the judgment read by Chief Justice Jervis in the Exchequer Chamber, to "the general principles of the law applicable to fraudulent and void transactions." In *Dillon* v. *Edwards*,[1] which related to the construction of the 3 Geo. 4, c. 39, an action of this kind was sustained against the sheriff on the ground that the goods were in his hands at the time of the action brought; but that is in opposition to the cases already quoted, and cannot be supported, though it is to be observed that in that case the goods, then undisposed of, were formally demanded by the assignees after the bankruptcy, and the sheriff formally refused to deliver them up. [Some discussion here took place on the use of the word "or" in the Statute 3 Geo. 4, c. 39, § 2. "The monies levied *or* the goods seized" are the words there used; the word *and* is used in the 1 & 2 Vict. c. 110, § 60, which recites and adopts the provisions of the former statute.]

[LORD WENSLEYDALE. — Suppose the transaction absolutely void, it would then be as if the bankrupt by his own act had transferred the goods. The assignees might then, under the words in 3 Geo. 4, "the monies levied or effects seized," recover the property wherever they found it.]

That could not have been the intention of the Legislature, for then, if the property remained in specie, it might be taken from every *bonâ fide* purchaser, not merely the second but the tenth or even the fifteenth purchaser, and the illegality of the transfer would not depend on any act of the purchaser, but on that of the insolvent. Such a construction would violate the principle which it was admitted had been established in *White* v. *Garden*,[2] that
a fraudulent transferee * could make a good title to a *bonâ* * 688
fide purchaser under him. *Biffin* v. *Yorke*[3] turned on the
fact of delay by the creditor. In *Becke* v. *Smith*,[4] it was held that an assignment made at any time, even a year previous to the imprisonment, if made with the view of petitioning the Court for the insolvent's discharge, was, under 7 Geo. 4, c. 57, void; but then, as explained by Mr. Baron Parke in the judgment,[5] that was

[1] 2 Moore & P. 550.
[2] 10 C. B. 919.
[3] 5 Man. & G. 428, 6 Scott, N. R. 222.
[4] 2 M. & W. 191.
[5] 2 M. & W. 196.

because of the express words of that statute. There are no such words here. The words "as against the assignees," added to the word "void," show that that word can only be applied when, and not before, there are such persons as assignees in legal existence. Apply the principle to the case of an entry made upon land under the authority of a person who afterwards becomes insolvent. Could a person who made the entry *bonâ fide* be afterwards treated as from the beginning a trespasser. There is a whole class of cases, of which *Weymouth* v. *Boyer*[1] is one, showing that he could not be so treated.

[THE LORD CHANCELLOR. — That general proposition need not be disputed, but it does not show that the transaction itself is not void from the beginning.]

There is no evidence here of a conversion, for, as was said in *Weymouth* v. *Boyer*, "the defendant did not wrongfully convert the goods, for they were left in the defendant's hands to be sold." Under such circumstances an auctioneer could not be held guilty of a conversion.

[LORD CHELMSFORD. — Suppose the goods had been in the hands of Young at the time of the bankruptcy, could the assignee maintain trover for them without a demand and refusal?]

Here they had been sold. It does not appear on the rep-
* 689 lication * to the fourth plea what became of the money produced by the goods; it might have been handed over to the insolvent himself before he was an insolvent, or it may have been paid to the assignees, or be still held by the sheriff on their account.

[THE LORD CHANCELLOR. — The count alleges that the defendant wrongfully deprived Flint of the goods, and the replication shows how that wrongful act was effected.]

But it is consistent with the pleadings that the money is still in the hands of the sheriff. The allegation in the count that the defendant wrongfully deprived Flint of the goods is inaccurate. There should have been a statement that Flint had assigned the goods to the defendant, and that the defendant had dealt with them under that assignment. As the allegations now stand, they improperly give the transaction the character of an act of bankruptcy. This may be most unjust. Suppose an insolvent to lend a creditor a

[1] 1 Ves. Jun. 416, 424.

horse worth two hundred guineas; while in the creditor's possession, but without any fault of his, the horse falls lame, and is worth only ten guineas. The title of the assignees then accrues. Why are they to refuse to receive the horse in its then state, and to recover it in trover as it was when it was lent, and so to be in a better situation than the insolvent would have been had he never become insolvent?

Mr. Lush (*Mr. Bovill* was with him) for the defendant in error. — The plaintiff's pleading here is good. The transaction is void. The Courts have held transactions of this kind to be only voidable in cases where they have found a manifest intention in the statute so to treat them, of which the *Lincoln College Case*[1] is an instance. But what was * the object of the Leg- * 690 islature in this enactment? It was that the property of the insolvent should be equally distributed among his creditors, and that any thing done to defeat that object should be void. The mischief to be guarded against was that of the debtor making away with his property to some favored creditor. To prevent that mischief the strongest words were used.

[THE LORD CHANCELLOR. — No; they might have been wholly unqualified, but they are not; the transfer is not declared to be absolutely void, but void as against the assignees.]

There was this reason for those words: not to make the transfer void as to the debtor who made it, but to make it void as to the creditors whom it might injure. The clause relates to spontaneous acts of the debtor, not to those which are forced from him by importunity and pressure; this was a spontaneous act. In the former case the Legislature says that such transfers of property shall not only have no operation, but that they shall be deemed fraudulent and void. They are void *ab initio*, and the property is still deemed part of the assets.

[LORD CHELMSFORD. — Do you mean void from the time of its being done as against a possible assignee?

LORD WENSLEYDALE. — So that no one can acquire a title in the meantime?]

That may be open to argument. It is at all times defeasible. It is conditionally void when the title of the assignee accrues; it

[1] 3 Rep. 53, 59 *b*.

is void from the beginning, though there are cases which assume that there may be a good title created in the meantime.

[THE LORD CHANCELLOR. — In the first count it is stated that the plaintiff was wrongfully deprived of these goods. How do you support that?]

In this way: the object of the statute is to secure the * 691 * property for the estate; the favoured creditor cannot set up any right to that property under a license or assignment from the insolvent, for the statute declares such assignment fraudulent, and void as against the assignees. It is to be treated as if it had never taken place, and farther, as a fraudulent preference, so that the creditor shall not be permitted to justify under the assent of the debtor. Flint not having the power to consent to transfer the goods, it is properly alleged that he was wrongfully deprived of them. Here the goods have been sold; they have therefore been converted, and a demand is not necessary. The refusal to deliver them would not have been a conversion, for the defendant had not got them; the sale was not wrongful as to the assignees, for they were not then in existence, but it was so as to the debtor who, by law, had no power to assent to it. The creditor, therefore, could not justify under the unwarranted and voluntary act of the insolvent.

[LORD WENSLEYDALE. — The pleadings do not show that it was voluntary.]

Yes, that very word is used in the replication.

The cases referred to have little bearing on the subject. The intermediate sales may be good, though the original transaction may be void; *Hoe's Case.*[1] But that does not enable a creditor who takes directly under an insolvent to set up the authority of that insolvent, when in law he had none to give.

[LORD WENSLEYDALE. — The only averment here is, that there was a charge on the property. The goods never came to the hands of the defendant; they were in the hands of the sheriff.]

That is equivalent to a delivery over by the insolvent, * 692 * and brings the case within the words of the statute. The transaction was perhaps rightful at the time, but it became, by the statute, wrongful afterwards.

[THE LORD CHANCELLOR. — You claim through the insolvent?]

No, paramount to him.

[1] 5 Rep. 90 *b*.

[THE LORD CHANCELLOR. — The declaration is, that the defendant wrongfully deprived the insolvent, &c.]

That is to make the transaction altogether wrongful. It is true that the form of action is not given by any statute, but it is properly applicable here.

Mr. Vernon Harcourt replied.

THE LORD CHANCELLOR proposed the following question for the consideration of the Judges: "Upon the whole record in this case, how in point of law ought judgment to be given?"

July 6.

MR. JUSTICE BLACKBURN. — My Lords, this case has been considered in the Court below by Judges, some of them now no more, and their judgments, distinguished for unusual force of reasoning and precision of thought, are in print. It is not my purpose to attempt to add any thing to the reasons so fully given below, but merely to state the conclusions to which, after some hesitation, I have come, on considering these reasons.

On the whole, I think that the reasons stated in the beginning of the judgment of Lord Wensleydale, delivered after his retirement from the bench by Mr. Justice Crowder, preponderate over the powerful arguments of the majority of the Court below. I think that the better construction of the statute is, that the transaction is valid till the assignees indicate an intention to treat it as void, and that consequently * the act of seizing * 693 or selling the goods under the authority of the transfer, whilst yet valid, cannot be treated as being a wrongful conversion. This opinion, if correct, disposes of the whole question, as it follows that there must be a *venire de novo*. I think it right, however, to guard against its being supposed that in my opinion no action at the suit of the assignees would lie against the favoured creditor. On the contrary, I am strongly disposed to think that as soon as the assignees avoid the transaction they may, by an action for money had and received, or at all events by a properly shaped action, make the favoured creditor refund any benefit which he has wrongfully received; and probably, if they can aver and prove that the defendant was a party to the fraudulent transaction, knowing it to be such, they may recover the full damage sustained by the

estate, though greater than the benefit received by the defendant; but for this purpose the *scienter* is material. It is not necessary to decide how this is; for, supposing it to be so, still the present action would not lie. The distinction, as pointed out by my brother Williams in his judgment below, is not merely technical. If the present action lies, an innocent party receiving a small benefit may be made liable for the whole value of the goods, which, in the view I have above suggested, is not the case. This, however, I merely state to guard against being supposed to have given any opinion that no such action lies. It is no part of the grounds of my opinion in the present case.

I answer your Lordships' question by saying that, in my opinion, there should be a *venire de novo*.

MR. BARON CHANNELL (after stating the declaration, pleas, and replication) said: — The defendant directed and may be taken to have assisted the sheriff in the sale of the goods under the * 694 execution * grounded on the judgment signed on the warrant of attorney, and an amount levied under the writ was paid over to the defendant. The defendant's conduct may be taken to have been *bonâ fide* throughout.

The facts stated in the replication (apart from any conclusion of law) are to be considered, for the purpose of your Lordships' question, to be correct. If they afford an answer to the fourth plea, the plaintiff is entitled to judgment on the whole record. If the facts so replied do not in themselves afford an answer, and there is no sufficient evidence to go to the jury, under the plea of not guilty, of a conversion by the defendant of goods of the insolvent, then there should, I think, be a *venire de novo* by reason of misdirection of the Judge at the trial, who on the plea of not guilty left that question to the jury.

The questions which arise on the issues joined on the first and fourth pleas are not identically, but are substantially, the same. They involve, as it appears to me, these two considerations: first, whether, in the event of the assignee of the insolvent not affirming the transaction of the warrant of attorney and judgment, the transaction is as against him absolutely and *ab initio* void; secondly, whether, supposing the transaction to be so void as against him, there has been a conversion by the defendant of the goods of Flint. Both these questions turn upon the construction to be placed

on the 1 & 2 Vict. c. 110, § 59. That section is (see ante, 688, n.).

To hold that this section renders the transaction actually void as against the assignees, instead of merely enabling the assignees to avoid the transaction at their election, and thus to put the transaction on the footing of a preference in bankruptcy before a fraudulent preference was made an act of bankruptcy, may no doubt give rise to some of the inconveniences pointed out in the argument at your Lordships' * bar. But the words of the * 695 statute are to my mind clear and distinct. The Legislature has enacted that the transaction shall be deemed, and it is by the Act declared to be, void as against the assignee. The object of the Legislature was, I think, to protect the interests of the general body of creditors, and to prevent any one creditor having the advantage, however innocent or ignorant that creditor may be, of any preference of him by the insolvent. If this construction gives rise to some hardship in certain cases, it must be remarked that to adopt a different construction would have the effect, in other cases, of withdrawing from distribution amongst the general body of creditors property of the insolvent fraudulently parted with by him, with a view to his petitioning the Court. I think there is no mode by which what I understand to be the intention of the Legislature can be fully and effectually carried out, but by holding that the transaction actually, and *ab initio*, is void as against the assignees. Assuming this to be the correct construction of the statute, has there been such a conversion by the defendant as will sustain the first count? I think that there has been such a conversion.

By the act of the defendant in issuing the writ of execution, goods, which according to my view must be taken to have been the property of the insolvent, have been seized and turned into money, and the defendant has received that money. Considering the intent with which the warrant of attorney must be taken to have been given by the insolvent, viz., to enable a creditor fraudulently preferred by the insolvent by means of a judgment to seize goods of the insolvent, the transaction is, I think, in substance same as a transfer or delivery, on the moment, of the goods s under the execution; and though the defendant was innocent * of any intent or preference which the insolvent may have had in his mind, and only dealt with the goods by the

process of the law, the seizure and sale directed or caused by the defendant, and the receipt by him of money from the sheriff, all which acts were by the Statute 1 & 2 Vict. c. 110, § 59, void as against the assignees, constituted, I think, a tortious conversion by the defendant sufficient to enable the plaintiff to maintain this action, and that no demand and refusal were necessary or could have been available.

The effect of the statute is, I think, to estop the defendant when sued by the assignees from saying that he so received the goods (taking the case as one of transfer), under any such license or authority of the insolvent, as to make the defendant's dealing with the goods under the execution an innocent and not a tortious dealing with the property of the insolvent, whose interest, for the benefit of the general creditors, the plaintiff represents.

Whether an enactment so general as that under consideration is a wise or just enactment is not for the Judges to consider, provided the effect and meaning be clear. The clear effect of the enactment is, in my humble opinion, what I have stated.

I think my brother Martin's view as to the form of the action, as expressed by him in his judgment in the Court below, is a correct one; viz., that the declaration may be read thus: that the defendant, before Flint became an insolvent, converted to his own use and wrongfully deprived Flint of the use and possession of the goods, and the plaintiff as assignee was damaged by reason thereof. The defendant did wrongfully deprive Flint of the goods, to the prejudice and damage of the plaintiff as assignee, if the effect * 697 of the statute is to render the transfer void *ab* * *initio* as against an assignee when appointed. When the assignee sues, the effect of the statute is to estop the defendant, who has procured or directed a sale of the goods, from saying he dealt with the goods by such authority or license of the owner as prevented that dealing from being tortious with respect to the assignee.

This view conflicts somewhat with an opinion expressed by the Courts of Common Pleas and Exchequer Chamber in *Stevenson* v. *Newnham*,[1] and also in *Brook* v. *Mitchell*.[2] But I think, for the reasons stated by Mr. Justice Cresswell, in his judgment in this case in the Exchequer Chamber, and by the late Lord Chief Justice Jervis on the occasion of his reading the judgment of the late

[1] 13 C. B. 285. [2] 6 Bing. N. C. 349.

Mr. Justice Maule, in this case, that the two cases referred to ought not to govern the present. If considered in point with the present case and not distinguishable from it, those cases ought, in my humble opinion, to be overruled by your Lordships.

I answer your Lordships' question by saying, that in my humble opinion judgment upon the whole record ought in point of law to be given for the plaintiff.

Mr. Justice Crompton. — My Lords, the expression "void as against the assignees," in section 59 of the 1 & 2 Vict. c. 110, seems to me clearly to imply that the transaction is to be valid as against the insolvent so as to give the creditor a title until it is impeached by the subsequently appointed assignee. The transaction is to be good except against the title to arise in the assignee in the case of subsequent insolvency. I agree, however, with the judgment of the majority of the Judges * in the * 698 Exchequer Chamber, for the reasons given by them, which I will not repeat, that the assignee has a right, as against the favoured creditor, to treat the whole transaction as fraudulent and void, so as to be able to maintain an action against such favoured creditor for the damage to the estate arising from the fraud.

As to the nature of the action, however, which he has a right to bring (not altogether, as observed by my brother Williams, a merely technical question), I have entertained great doubt.

It struck me at one time that the assignee might say, "I treat this transaction as entirely void. As far as regards you, the favoured creditor, at all events it can operate neither as a transfer of the property nor as an authority to deal with it. You are estopped by the statute from denying, as against me, that it remained the property of the insolvent, or from asserting, as against me, that you had any valid authority or license to deal with it. Whilst it so remained the insolvent's property, there was an actual conversion by your selling the goods, which makes a demand useless and idle, and there is a damage to the estate, that is, to me, the assignee, as alleged in the declaration; and I, therefore, prove the allegations in my declaration of property in the insolvent, — conversion by you, the defendant, and damage to me, the plaintiff."

The case of *Martin* v *Pewtress*,[1] cited by Mr. Justice Cresswell,

[1] 4 Burr. 2478.

is in favour of this view, as it would seem from the facts, and from the report of Lord Mansfield, where he says, "the plaintiffs could not recover unless the property was in the bankrupt;" that the action was for a conversion in the bankrupt's time. It * 699 was urged by the * counsel in that case, and apparently assented to by the Court, particularly by Mr. Justice Yates, that in such case the assignees may set up the fraud, though the bankrupt, the party to it, cannot.

The case of *Nixon* v. *Jenkins*[1] does not seem to me to be inconsistent with that of *Martin* v. *Pewtress*, as in that case, as I read it, the action was for a conversion in the time of the assignees. There was no sale or actual conversion, but the goods remaining in the hands of the creditor, the Judges thought that, before making him a wrongdoer, in the absence of an actual conversion, there should be a demand and refusal; and they observed quite accurately, that the assignees might affirm or disaffirm the contract. This seems to me quite right, and quite consistent with the right of the assignees to bring an action for an actual conversion, without making a demand; they showing, by bringing the action, that they are proceeeding for a wrongful act, and are treating the transaction as fraudulent. Some of the later cases to which your Lordships have been referred, however, appear to me to be strong authorities against the right to maintain trover in a case like the present. I may remark in passing, that in the last of them, *Stevenson* v. *Newnham*, the Court expressly refrains from deciding whether an action would lie for the fraud.

My difficulty arises from the peculiar nature of the count in trover upon a conversion in the time of the bankrupt or insolvent, and in seeing how it is applicable to the present cause of action, which I think exists on the facts as stated in the bill of exceptions, especially as against a creditor cognizant of the circumstances, and as to whom it must be taken that there was evidence of his being a participator in the fraud. The count in trover, on a * 700 conversion * in the bankrupt's or insolvent's time, seems to me to apply to a cause of action perfect in the time of the insolvent, and in respect of which time the damage is to be calculated, being the value of the goods at that time, unless under very peculiar circumstances, as where the goods have been returned. I understand the count in question to mean that the right of action

[1] 2 H. Bl. 135.

for the damages has accrued in the time of the insolvent. Can that be said in a case like the present? The act was certainly not wrongful when it took place, as it was good as against the insolvent, and no insolvency might ever have taken place. It appears to me that until the assignee is appointed, and the title vests in him, and he chooses by bringing an action, or otherwise, to treat the transaction as invalid, no cause of action has accrued.

The real cause of action is the damage to the estate, when the title to it has vested in the assignee; and as there is no relation back as in bankruptcy, which causes this case to resemble cases of fraudulent preference before the statute making such preferences acts of bankruptcy, or where that statute does not apply, the cause of action does not seem to me to arise till the assignee's title has commenced by the estate vesting in him. The damages, as pointed out by my brother Williams in his judgment in the Exchequer Chamber, may be very different. If the right to sue arose to the insolvent by reason of a taking of his goods wrongfully as against him, the amount would be the value of the goods, whereas if the damages be the injury to the estate arising from the fraud, they may, in many of the cases put, be much less. In a special action, the real damage to the estate might, I think, be recovered, the declaration showing that the party was in insolvent circumstances, and voluntarily and within three months, or with the intention of petitioning, made the charge, delivery, or * transfer, and that afterwards the insolvent petitioned, and *701 that the plaintiff was assignee, and the estate was vested in him, and was damaged, and, if necessary, that the defendant was a party to the fraud.

In cases where the goods were in the hands of the creditors, there can be no difficulty in demanding them, and bringing trover on a refusal, and if the creditor has sold the goods, money had and received might, perhaps, lie, though I am much struck with the remarks of Mr. Justice Cresswell, as to whether money had and received is the proper form of action in such case.

Again, from what time does the Statute of Limitations run, as against the action of the assignees? Can it be from the dealing with the goods in the insolvent's time, when it is clear that there was nobody to sue, or is it not to run from the time when the assignee can sue? The first count seems, on the other hand, to apply only to a cause of action complete by the alleged conversion in the in-

solvent's time, from the date of which conversion the Statute of Limitations seems to commence running.

I am inclined, therefore, to think that the present cause of action arises only by reason of the accruing of the title of the assignees, and is not within the meaning of the first count, which I am disposed to think amounts to a statement of a cause of action perfect in the insolvent whilst he is insolvent, which passes as a chose in action to the assignees, and as to which the Statute of Limitations commences running from the date of the alleged conversion. This would show that there was no such perfect and complete conversion in this case, as against the insolvent, as would give him a right of action within the meaning of the allegation in the first count.

In the question proposed to us, your Lordships ask what * 702 * judgment is to be given on the whole record. The parties not having adopted Lord Wensleydale's suggestion, you are called upon to decide the question in the first instance on the bill of exceptions, and if the count on a conversion in the insolvent's time is not applicable, there ought to be a *venire de novo*, and your Lordships could of course give no judgment on the rest of the record, as no judgment could be given until it was known how the issues are found on a subsequent trial. In such case it is possible that the ends of justice might be answered by an amendment, which it might be competent for the Court below to make on proper terms.

I incline to think that judgment should be given on the bill of exceptions for a *venire de novo*.

Mr. Justice Williams. — I am of opinion that, upon the whole record in this case, there ought to be a *venire de novo*, because I think the Judge's direction at the trial was erroneous, inasmuch as he told the jurors there was evidence for their consideration, on which they might find their verdict for the plaintiff on the issue raised on the plea of not guilty to the first count of the declaration.

It has not, I think, been sufficiently borne in mind, in the discussion of this case, what that first count is. It lays the possession of the goods in the insolvent, and the conversion before the insolvency. It is not, therefore, founded on any right of action which has accrued to the assignees, except by reason of their be-

ing entitled to the estate of the insolvent. If the right of action alleged in the first count ever existed at all, it existed at the time of the insolvency, and passed, together with the other choses in action of the insolvent, to his assignees, the plaintiffs, * as * 703 part of his estate for the benefit of his creditors; and the only question is, whether such a right of action ever existed in the insolvent. I am of opinion that it never did, for the reasons I have already expressed in the court below. The arguments at the bar of this House have not induced me to take at all a different view of the case, and I therefore think I may not improperly refer your Lordships to that report, rather than occupy your time in repeating my reasons here.

MR. JUSTICE WIGHTMAN. — The defendant in error, as assignee of Benjamin Flint, an insolvent, sued the plaintiff in error, and in his declaration complained that the plaintiff in error, before Flint became insolvent, converted to his own use, or wrongly deprived the said Benjamin Flint of the use and possession of his goods. The plaintiff in error pleaded not guilty, and the point to be considered is in effect raised by that plea; the question being whether there was any evidence in the case of a wrongful conversion. [His Lordship stated the facts of the case.]

Upon this state of facts and dates, I do not see how the action can be sustained in its present form. The defendant in error founds his claim upon section 59 of the 1 & 2 Vict. c. 110 [reads the section]. At the time the warrant of attorney was given, it was not fraudulent or void as against anybody, certainly not against Flint the insolvent, nor was it until after judgment had been entered up and execution issued, and the goods of the judgment debtor taken and sold by the sheriff, that it became void as against the assignee of the insolvent. By the express terms of the Act, it is only void "as against the assignee," and as he has no title by relation farther back than the vesting order, I do not understand how he can recover in an * action for converting to * 704 his own use, or wrongfully depriving Flint of the use and possession of his goods, the whole transaction being good as against Flint himself. I feel in this case all the difficulties that were suggested by Lord Wensleydale in the judgment which was delivered by the late Mr. Justice Crowder, and in which judgment I entirely concur. It may be that the assignee might be entitled

to succeed in a special action upon the case, or after a demand and refusal, but not in such an action as the present, in which the assignee proceeds as for a wrong done to the insolvent. The case of *Brook* v. *Mitchell*[1] is a very strong, and as it appears to me, direct authority, to show that the present form of action is not adapted to the case of the assignee, and that he is not entitled to recover. Upon the whole, then, I am of opinion that the action in its present form is not maintainable, and that there should be a *venire de novo*.

Lord Chief Baron Pollock. — I entirely agree with the judgment pronounced in this case by Mr. Baron Martin in the Court of Exchequer Chamber, a copy of which is before your Lordships. The language of the statute is clear and explicit, that such a transaction "shall be deemed fraudulent and void," and it is thereby declared to be so "as against the assignee."

This is an inconvenient mode of legislation (which unhappily occurs too often in modern times), by which a thing is declared to be and is to be deemed to be what it was not and is not, but it is quite plain and intelligible; and although we may not approve of such a mode of obtaining the object of the Legislature, there is no rule of construction which will enable us to put an interpreta-
* 705 tion * upon it different from the plain meaning of the words used.

But as it is to be void, not absolutely, but as against the assignees, it would follow (from a well-known principle) that they are not bound to avail themselves of the statute, but may treat the transaction as valid if it be thought advisable to do so.

It seems to me that the more correct and safe interpretation of the statute is, that the transaction is void as against the assignees, unless by some act they affirm it, and not that it is voidable only, and they must do some act to make it void.

The consequence of this would be, that the assignees are entitled to maintain some action against the defendant.

But it is said they cannot sue in this form without first making a demand. If by that is meant that a demand is necessary, in order to declare their option to treat it as void, I have always expressed my view that such a demand is unnecessary for that purpose, because it is void unless they affirm it.

[1] 6 Bing. N. C. 349.

If the demand is said to be necessary in order to support the count in trover, the answer is that there has been an actual conversion, and, therefore, no demand is necessary; and I concur in the opinion of Mr. Baron Martin, that the declaration may well be read so as to sustain the claim of the plaintiff; and as your Lordships are bound to give judgment according to the very right as it appears on the whole record before you, I am of opinion that the plaintiff below is entitled to judgment.

August 3.

THE LORD CHANCELLOR (LORD CAMPBELL). — My Lords, I agree with the majority of the Judges who, in answer to the question put to them by your Lordships, * have expressed their * 706 opinion that this action cannot be maintained.

The only count in the declaration relied upon is in trover, alleging a conversion in the time of the insolvent, and supposing that this conversion was wrongful as against him; but, by the statute on which the case of Billiter, the plaintiff, rests, the transaction is only made void "as against the assignee of the insolvent." Not a single allegation in this declaration is supported by the evidence; and in every action the plaintiff must succeed *secundum allegata et probata*. The only argument of the plaintiff is, that the warrant of attorney must be considered as if it never had any existence. But there are no words in the statute to work such an annihilation. The warrant of attorney existed, and was valid as to the insolvent when the conversion took place, and the alleged cause of action accrued.

But I by no means say that the assignee is without remedy; on the contrary, I am inclined to think that, by a declaration, properly framed, he might recover for the benefit of the creditors, the warrant of attorney being made void "as against the assignee."

A *venire de novo* must be awarded, as the Judges have suggested, unless some arrangement may be made between the parties, to avoid the necessity of a new trial, which can have no object except with a view to costs.

LORD CRANWORTH. — It is not my intention to trouble your Lordships with more than a single observation, because I think the mere statement of the cause of action, on which alone there has been a verdict found for the plaintiff, is sufficient to show that the action

cannot be sustained. The declaration is, that the defendant
* 707 wrongfully deprived the insolvent of * the use and possession of certain goods. Now, the only way in which the defendant deprived the insolvent of the use and possession of the goods is, that the insolvent delivered them over to him, and, therefore, the insolvent had no right to complain of the conversion. It appears to me that that really exhausts the whole subject. I may add that, perhaps, I should have thought it necessary to go fully into the case, were it not that I think that the whole view of the subject has been presented so clearly and forcibly in the judgment read by Mr. Justice Crowder in the Court of Exchequer Chamber,[1] which is known to have been the judgment of my noble and learned friend[2] opposite, while he was a member of the Court of Exchequer, that it would be useless to detain your Lordships merely by putting in other language that which is so well stated there.

LORD WENSLEYDALE. — A *venire de novo* must be awarded. I am quite satisfied that the judgment of the Court of Exchequer Chamber ought to be reversed. I have considered this subject a great deal, having heard it argued in the Court of Exchequer Chamber five years ago, when I was a member of that Court. The judgment which was read by Mr. Justice Crowder, and which I prepared, expressed my sentiments, which had been adopted after a full and careful consideration of the subject. On reconsidering the question, as I have done in the course of this argument, I do not think there is a single word that I could alter in that judgment. I am satisfied as to both parts of it; that the warrant of attorney was merely void-
able, and that what was done under it could not be made
* 708 the subject of this action. I * beg, however, to express a doubt, and only a doubt, whether my noble and learned friend on the Woolsack is right in saying that there could be any form of action in this case upon which the assignees could have redress, as no injury was done to them, and their remedy was to take the goods, supposing the warrant of attorney to be void.

LORD CHELMSFORD. — This case has been so fully considered in all its bearings in the Court below, and by the learned Judges who have

[1] 6 Ellis & B. 3.

[2] Lord Wensleydale.

assisted your Lordships, that I feel it necessary to state, only in a few words, the conclusion to which I have been led by a consideration of the various arguments urged in support of the different opinions which have been expressed.

The whole question resolves itself into a technical difficulty arising out of the form of action in the first count of the declaration. The count charges the defendant with converting to his own use, or wrongfully depriving Flint, the insolvent, of the use and possession of certain goods which it describes. I do not think that it is possible to read this count in the manner suggested by Mr. Baron Martin, in the Court below,[1] viz., "That the defendant, before Flint became an insolvent, converted to his own use, and wrongfully deprived Flint of the use and possession of the goods seized; and that the plaintiff, as assignee, was damaged by reason thereof," because this would not only be contrary to the obvious intention of the count, but to the case proposed to be made by the plaintiff, which is not founded upon any wrong done to the insolvent, but upon the avoidance, by force of the statute, of the transaction as to the plaintiff, as assignee. The plaintiff can * therefore, * 709 only be entitled to recover under the count, as framed, by construing the words of the 59th section of the 1 & 2 Vict. c. 110, "fraudulent and void as against the assignees," as if they were "fraudulent and void" absolutely. But we must suppose that the qualifying words were intended to have some meaning; and no other can reasonably be assigned to them than that, as to all other persons but the assignees, the transactions mentioned in this section are good and valid. The consequence of this is, that no right existed in the insolvent, or in any one else, to impeach the transaction until the vesting order of the Insolvent Court; and that no right of action passed to the assignee as part of the insolvent's estate. On the appointment of the plaintiff as assignee, a right immediately arose, by force of the statute, but only available from that moment, and having no relation back to the time when the transaction took place. If a question arose upon the Statute of Limitations, could it fairly be doubted that the time would begin to run from the appointment of the assignee, and not from the period of the supposed conversion of the goods of the insolvent?

Upon the short ground, therefore, that the first count charges a

[1] 6 Ellis & B. 20.

conversion complete in the time of the insolvent, and that the assignee has placed his right of action upon this conversion alone, I think that the jndgment of the Court of Exchequer Chamber is wrong, and that it ought to be reversed.

LORD BROUGHAM entirely concurred.

LORD WENSLEYDALE. — There will be a *venire de novo.*

Mr. Harcourt. — With reference to that point, I should wish to ask your Lordships whether it is competent to me now to
* 710 abandon my bill of exceptions and the plea of * "not guilty," and to ask, upon the fourth plea, and the replication to it, to have the judgment reversed, and a verdict entered for the defendant?

LORD WENSLEYDALE. — *Non obstante veredicto?*

Mr. Harcourt. — It would be upon the face of the record. What I submit is, whether, if I abandon the bill of exceptions and the plea of "not guilty," I should be entitled to have judgment entered for the defendant upon the special pleading. I do not know whether your Lordships will think that it is competent to me now to make that application.

Mr. Bovill. — With reference to that question, your Lordships see that the case has come here upon the bill of exceptions; and the judgment of the Exchequer Chamber has proceeded upon the bill of exceptions.

Mr. Harcourt. — I argued the question before your Lordships altogether upon the special pleading.

THE LORD CHANCELLOR. — This high Court, along with the inferior Courts, has always ample power of amending and directing the form of the pleadings to gain the ends of justice, but I doubt very much whether what is suggested can be done.

LORD CRANWORTH. — It had not escaped the attention of the Lords who heard the case, because we have very much considered that point; but I am afraid that we have no power to do it.

Mr. Harcourt. — I thought that under the Common Law Procedure Act, which altered the practice with respect to writs of error to this House, there was a power of directing that the judgment should be in any form that the House might think fit. Your Lordships will remember that the argument before you proceeded upon the special pleading, not upon the issue of "not guilty."

* LORD CHELMSFORD. — We are all of us anxious that it * 711 should be done if possible, but I am afraid that it cannot be done.

THE LORD CHANCELLOR. — It must be understood that the judgment of the House will be for a *venire de novo*, unless you can come to some arrangement, which I should think would be quite practicable.

Mr. Bovill. — I should think that will be the result. Indeed the case almost necessarily resolves itself into that.

LORD BROUGHAM. — In the meantime it is a simple reversal.

THE LORD CHANCELLOR. — A *venire de novo nisi.*

LORD WENSLEYDALE. —What I recommended in the Court below was, that "the judgment should be reversed and a *venire de novo* awarded, unless the parties would agree to strike out the plea of 'not guilty' to the first count," on such terms as might be arranged, "and then the judgment should be reversed and given for the defendant on the special pleading, *non obstante veredicto.*"

Judgment reversed. Venire de novo awarded.

Lords' Journals, 3d August, 1860.

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* SIMPSON v. THE DIRECTORS OF THE WESTMINSTER PALACE HOTEL COMPANY AND SIR C. WOOD. * 712

1860. August 6, 7.

JAMES SIMPSON, ... *Appellant.*

THE DIRECTORS of the WESTMINSTER PALACE HOTEL COMPANY and SIR C. WOOD, ... } *Respondents.*

Joint Stock Company. Objects of not to be changed even by a Majority. Costs.

The funds of a joint-stock company established for the purposes of one undertaking cannot be applied to another, and the attempt so to apply them, though sanctioned by all the directors, and by a large majority of the shareholders, is illegal. But where a company was established "for the erection, furnishing, and maintenance of an hotel, the carrying on the usual business of an hotel and tavern therein, and the doing all such things as are incidental or otherwise

conducive to the attainment of the above objects;" and the directors, while the hotel was in the course of being built, agreed to let off, for a stipulated period of short duration, a large portion of it to the head of a Government department for the business of his office, and evidence was given that such a letting was calculated to be productive of advantage to the company in its intended business, and that a majority of shareholders had sanctioned the act, it was

Held, that the arrangement was valid within the words of the clause, "all such things as are incidental or otherwise conducive to the attainment" of the objects for which the company was established.

The Lords Justices were divided in opinion as to the propriety of the Vice-Chancellor's decree, and so no costs were given in this House.

In June, 1857, a company was formed under the provisions of the "Joint Stock Companies Act, 1856," to erect and maintain a great hotel for purposes set forth in a prospectus. So far as they are material to be considered in this case, they are the following: The third article of memorandum of association declared that "the objects for which the company is established are the purchase of leasehold lands in the city of Westminster, the erection, fur-
*713 nishing, and maintenance of an hotel thereon, * the carrying on the usual business of an hotel and tavern therein, and the doing all such things as are incidental or otherwise conducive to the attainment of the above objects."

The 32d article contained, among others, these terms: The directors shall, subject to the powers of the general meetings, have the entire management of the company, and they shall have power to enter into, alter, or rescind contracts in such manner as they shall think fit. And also to incur debts in the ordinary course of business, and to issue bills of exchange and promissory notes, and also to advance upon security any money which may be in their hands and not immediately required for the purposes of the company, and generally to do all acts, matters, and things which are necessary for carrying on the business of the company."

There was a plan of the building issued, and attached to it was the following explanatory note: "There are, therefore, two hundred and fifty-seven rooms for the occupation of visitors, independently of the coffee rooms (one for ladies), arbitration rooms, the library, billiard, and smoking rooms, and the suite intended to be set apart for a proposed engineers' club. The grand total, including the offices, being four hundred and fifteen rooms."

The appellant became a holder of fifty shares in this company.

In the early part of 1860, when the building was nearly com-

pleted, an offer was made on behalf of Sir C. Wood, then Secretary of State for India, to take on lease a part of the hotel. For this purpose the proposals stated (Art. 5): "The building is to be adapted to the uses of the Secretary of State for India agreeably to the plans of Mr. Wyatt." Art. 10: "The Secretary of State to take for three years certain, with the option on his part only of * remaining for one or two years beyond the first three * 714 years of occupation. Notice of his intention to exercise or vacate his option must be given by the Secretary of State to the Westminster Palace Hotel Company, six months at least previous to the expiration of the original term of three years."

Art. 13: "The Secretary of State to afford the Westminster Palace Company, limited, a monopoly (during the tenancy by the Secretary of State of the portion of the hotel now agreed for) for the supply of the premises so occupied with provisions, beer, wine, liquors, and refreshments, the whole to be supplied of equal quality and at similar prices to those now sanctioned in her Majesty's Treasury offices; and if in the exercise of this monopoly any difference should arise between the parties, the same is to be submitted to the arbitration of Mr. William Moseley and Mr. M. Digby Wyatt, who are previously to proceeding to appoint an umpire to decide any difference which may arise between them."

And subject to the conditions of the agreement, the Secretary of State for India was to pay an annual rent of 6000*l.* The rent was to commence from the date of his being put into complete possession. The directors accepted these terms. About 21–47ths of the whole building was thus made the subject of the lease. Differences of opinion arose among the shareholders as to the propriety and as to the legality of such a disposal of part of the hotel, and an extraordinary general meeting of the whole body was held, when the act of the directors was affirmed, upon a poll, by 1690 to 1345 votes.

The appellant afterwards filed his bill, praying that the agreement might be declared invalid, and for an injunction and general relief. Evidence was taken on both sides. The cause was heard on motion for an injunction, which was * treated as a * 715 hearing on a motion for a decree, and Vice-Chancellor Wood made an order dismissing the bill. On appeal to the Lords Justices, Lord Justice Knight Bruce was of opinion that it should be

affirmed. Lord Justice Turner thought that an injunction ought to issue.

The order, therefore, stood affirmed.

The appeal was then brought.

Mr. Giffard and *Mr. Jessel*, for the appellant. — The object of this agreement is entirely different from that of carrying on the business of a hotel-keeper, which was the object for which the company was instituted. The agreement cannot, therefore, be sustained; *Natusch* v. *Irving*,[1] *Const* v. *Harris*,[2] *Colman* v. *The Eastern Counties Railway Company*.[3] Occupation of rooms for the purposes of the public business of the Government is not occupation for the business of an hotel, more especially when the occupants do not take their meals there, nor sleep there. This letting, therefore, does not fall within any of the words defining the power of the directors, and consequently is not an act which can by law be confirmed and rendered valid even by the vote of a general meeting.

Mr. Rolt and *Mr. Cotton* for the directors. — This sort of occupation is certainly within the meaning of the purposes of an hotel. In many hotels rooms are let from day to day for public meetings, and for arbitration meetings, and for other purposes to which eating and drinking are only incidental accessaries. Besides, one of the articles of association expressly mentions rooms to be *716 * reserved for an engineers' club. The agreement is within the spirit of that article. It was, therefore, within the power of the directors to make the agreement, and most certainly within the power of the shareholders to confirm it. The evidence [which they fully referred to] of many hotel-keepers shows that the letting off of rooms is part of the business of a hotel-keeper, and in this case there can be no doubt that it will be a profitable arrangement. The cases cited are not in point; for to make a fire insurance office into a marine insurance office, or a railway company into a steamboat company, is to convert the original business into one wholly different from what it was intended to be.

[1] Gow on Partnership, 2d ed. 8, 126, 257, and Append. 404.

[2] Turn. & R. 496.

[3] 10 Beav. 1, 4 Railw. Cas. 513. See also The Shrewsbury Railway Company *v.* The North Western Railway Company, 6 H. L. Cas. 113.

The principle is not disputed, but its application here is denied. On the other hand, the right of the plaintiff to maintain such a suit as this, under such circumstances as exist here, may be considered as denied by the decisions in *Foss* v. *Harbottle*,[1] *Mozley* v. *Alston*,[2] and *Lord* v. *The Copper Miners' Company*.[3]

Mr. Forsyth, for Sir C. Wood, did not address the House.

Mr. Giffard in reply. — The cases cited on the other side are not in point; they depended on the form of the proceeding, and on the fact of actual ratification by the shareholders who in those cases had the legal power to ratify. Here they have no such power.

THE LORD CHANCELLOR (LORD CAMPBELL). — I think that this case is to be determined on the principle laid down by Mr. Giffard, in his very able argument * for the appellant; *717 and I bow to the authority of *Natusch* v. *Irving*, and the other decisions to which he referred. The funds of a joint-stock company established for one undertaking cannot be applied to another. If an attempt to do so is made, this act is *ultra vires*, and although sanctioned by all the directors and by a large majority of the shareholders, any single shareholder has a right to resist it; and a Court of equity will interpose on his behalf by injunction. A railway company cannot apply its funds to make a line of railway different from that described in the Act by which the company was constituted; a company established for granting fire and life insurances cannot engage in marine insurances; a company established to make a railway, and exercise the trade of carriers upon the line from one town in England to another, cannot add to it the trade of a steam packet company; and no company can ever abandon the business for which it was established, and undertake another.

Nevertheless, I cannot say that Vice-Chancellor Page Wood and Lord Justice Knight Bruce were wrong in holding that this agreement between the Westminster Hotel Company and the Secretary of State for India is not *ultra vires;* for I think that under this agreement the directors do not abandon the undertaking for which the company was established, and they cannot be said to engage in any new undertaking.

I agree that the case depends upon the fair construction of the

[1] 2 Hare, 461. [2] 1 Phill. 790. [3] 2 Phill. 740.

third article of the Memorandum of Association. There is a difficulty in saying, that the letting of so large a portion of the hotel to the Indian Board for so long a time is "carrying on the usual business of an hotel or tavern therein," but I conceive that it is (in the words of the third article) doing a thing "otherwise conducive to the attainment of the described objects of the undertaking." An hotel, to be used as such, still remains in
*718 *the hands of the Company. This hotel is larger than any other hotel in England, and in this portion of the building the usual business of an hotel and tavern is to be carried on. Mr. Ellis, the experienced hotel-keeper, who is to carry it on, swears that, in his opinion, it can be more advantageously carried on in this manner, than if the whole building were from the first put under his management as master of the establishment. I rely much upon the consideration that the arrangement is temporary and preliminary, and conducive to the ultimate object of the whole building being devoted to the proper business of the hotel. From the large rent immediately to be received by the company for the occupation of the one hundred and sixty-nine rooms by the India Board; from the monopoly to be enjoyed by the company in supplying so many persons with refreshments; and from the fashionable reputation to be conferred upon the hotel by this association, the opinion expressed by the majority of the shareholders, that the arrangement is beneficial to them, is likely to be verified. This anticipation would not be sufficient, if the original undertaking had been abandoned, or if there was any extension of the original undertaking; but as there is neither abandonment nor extension of the original undertaking, and the arrangement may assist, instead of obstructing the prosecution of the original undertaking, I must advise your Lordships to affirm the decree appealed against.

Should your Lordships concur in this opinion, I would farther advise that the appeal be dismissed without costs; for the appellant, like the respondents, appears to have acted with perfect good faith; and considering the division of opinion in the first Court of Appeal to which he resorted, he was fully justified in bringing the question to be determined by your Lordships.

*719 *LORD CRANWORTH.—I concur in the result at which my noble and learned friend has arrived, though I must own, not without having experienced very considerable doubt during the

progress of the argument. I do not think that it would have been open to the majority of the shareholders, or to all the shareholders except one, to apply the funds of the company to any thing that was not, in a legitimate sense, part of the business of carrying on an hotel; but it appears that it is part of the business of an hotel, and a very common mode of carrying on that business, to let rooms for a long time, much more than a night, or two or three nights. The evidence shows in one case, I think that of the Colonnade Hotel, a large portion of the hotel was let to some club during the recess, while the club house was under repair. Now it appears to me, that what has been done in this instance is but an application of the same principle; it is no doubt to a very much larger extent, but this hotel itself is so gigantic in comparison with any thing that we have hitherto known in this country, that I think the difference is not more than a difference of degree. Therefore, though not without having experienced some doubt upon the subject, I entirely concur in the result at which my noble and learned friend has arrived.

Lord Chelmsford.—I have also entertained considerable doubt during the course of the argument, but I am very glad that my noble and learned friends have come to the conclusion at which they have arrived, because I am satisfied that this arrangement will be highly beneficial to the shareholders, and will aid rather than obstruct the objects of the undertaking, while it appears to me quite clear that it does not * interfere with the * 720 general principle upon which the undertaking is based.

Lord Kingsdown.—I entirely concur in the judgment proposed by my noble and learned friend on the Woolsack. There is in fact no question about the principle by which the decision in such a case as this is to be guided. It appears to me, that the object of the parties in entering into this arrangement i
into effect ultimately the plan laid down in the prospec
company. It is not for us to judge whether this is a
unwise proceeding. If we were capable of forming
upon that subject, I, for one, should think it a most
course to be pursued. But it would be necessary, in or
vent the directors from following that course, that we
quite satisfied that it is *ultra vires*. I confess that, s

thinking that it is *ultra vires*, I think it is entirely within their powers, and therefore that the judgment proposed by my noble and learned friend on the Woolsack should be agreed to by your Lordships.

Decree affirmed.

Lords' Journals, 7th August, 1860.

1861. February 18, 19.

THOMAS J. SAUNDERS, *Appellant.*
BRIDGET EVANS and Others, *Respondents.*

Power of Appointment. Deed or Will.

If there is an original power of appointment, and then an execution of that power, reserving a power only to revoke, followed by a revocation, the original power remains unaffected. And if in the first instrument, executing the original power, there is reserved a power of revocation and of new appointment, such instrument does not constitute a new settlement destructive of the first, nor is the original power thereby exhausted and at an end, but, upon the revocation of such instrument, exists in full force.

If there is a power of appointment to be exercised by deed or will, and the first instrument executing the power is a deed which contains the reservation of a power to revoke and to appoint anew by deed, and then there is a simple revocation of this instrument, the original power, on such revocation, being in full force, there may be a valid execution of it by will as well as by deed.

In 1794, an estate in land was made the subject of a settlement, under which two persons then about to be married were to have life interests, remainder to the use of such persons for such estate, &c., as A., the intended wife, by any deed, with or without power of revocation, attested by two or more witnesses, or by will attested by three witnesses, should from time to time, and as often as she should think fit, appoint. In 1830, A. by deed exercised this power, and the deed contained a power, by deed, to revoke and to make a new appointment. In 1833, a deed revoking that of 1830, and newly appointing, and also reserving power, by deed, to revoke and newly appoint, was executed. This course was exactly repeated in 1835 by a deed of that date. In 1836, A. executed another deed, simply revoking that of 1835. In 1848, by a will reciting the power of 1794, A. declared the uses of the estate: —

Held, that the deed of 1830 had not exhausted the power of 1794, and substituted a new power for it, to be executed only by deed; and that consequently on the revocation, in 1836, of the last preceding deed, the power of 1794 was capable of being exercised by A. either by deed or will.

THIS was a special case prepared under the 13 & 14 Vict. c. 35, § 1, for the consideration of the Court of Chancery. The question was, whether the donee of a * power under a deed * 722 of 1794 had exhausted it by the execution of a deed in 1830, or was able to make a valid will under the authority of the original power of 1794.

The case set forth in substance the following facts: In 1794, on occasion of the marriage of John Evans and Anne Lewis, spinster, lands were settled to her use for life, remainder "to the use of such person or persons for such estate or estates, interest and interests to take effect at such time or times, in manner and form as she, notwithstanding her coverture, by any deed or deeds, with or without powers of revocation, to be sealed and delivered by her, in the presence of and attested by two or more creditable witnesses, or by her last will and testament in writing, or by any writing or writings in the nature of a will, or by any codicil or codicils to be by her signed, sealed, and published, in the presence of three or more creditable witnesses, should from time to time, and as often as she should think fit, devise, direct, limit, or appoint." In case of no appointment by deed or will, the estate was to go over to the second son of Thomas Saunders, his heirs, &c.

The marriage took place, and in 1820 John Evans died without issue.

In 1830, Anne Evans the widow, by a deed duly executed, reciting the indenture of 1794, and that she was desirous of exercising her power of appointment, subject to the power of revocation and new appointment, did, in "the exercise and execution of the power or authority, powers or authorities, given, limited, or reserved to her in or by virtue or by means of the said hereinbefore recited indenture [of 1794], and also by virtue and in exercise and execution of all and every other power or powers, authorities or authority enabling her in that behalf," appoint the estates to certain uses therein stated. And she "did * thereby reserve to herself full power and authority at any * 723 time or times thereafter, by any deed or deeds, to be sealed and delivered by her in the presence, &c., to alter, vary, revoke,

determine and make void, either in part or in the whole, the direction and appointment thereinbefore made by her, and all or any of the uses, &c., and by the same or any other deed or deeds to be sealed, &c., to make any other direction or appointment which might have been made under and by virtue or means of the power of appointment reserved to her as therein aforesaid, of and concerning so much and such part of the messuages, &c., to which such revocation should extend."

By another deed executed in 1833, reciting that of 1794 and that of 1830, Anne Evans revoked the deed of 1830, appointed new uses, and, as before, reserved to herself full power and authority "by any deed or deeds to vary and revoke" this deed, and by any new deed to make any other direction or appointment.

By another deed executed in 1835, reciting that of 1794, and that of 1833, Anne Evans again exercised the power of revocation, and made a new appointment, and again reserved to herself the power by any "deed or deeds sealed," &c., to revoke and to make and appoint new uses.

By a deed, dated 26th August, 1836, reciting the deed of 1794, and the three other deeds of 1830, 1833, and 1835, Anne Evans revoked the last-mentioned deed, but did not make any new appointment.

In March, 1848, Anne Evans made a will, duly attested, as required in the settlement of 1794, and reciting that settlement, and purporting to be in execution of the power and authority thereby reserved to her, and by this will directed the estates to be sold, and made other specific dispositions of all her property.

She died in May, 1848, and the estates were put up to sale
* 724 and bought, but the * purchaser declined to complete the purchase, as he was advised that no good title thereto could be made under the will. The estates were claimed by the son of Thomas Saunders, who, under the settlement of 1794, was to become entitled in tail in default of appointment duly made under the power thereby created.

The question submitted in the case was, first, whether the will of March, 1848, was a valid disposition of the property. This question was argued before Vice-Chancellor Kindersley, who decided that the will did not operate as a valid appointment.[1] On

[1] 1 Drewry, 415, 654.

appeal to the Lords Justices this decision was reversed.[1] The present appeal was then brought.

Mr. Daniel and *Mr. Greene* (*Mr. Drewry* was with them) for the appellant.—The power conferred on Anne Evans, by deed of 1794, was entire and indivisible; it was a power to appoint with or without revocation, and was to be exercised by deed or by will, but not by both. That power was exercised by the execution of the deed of 1830, and by that deed something new was created, which was in fact two powers, that of revocation and that of new appointment; *Granger* v. *Tiving*.[2] This is fully commented on in the judgment of Vice-Chancellor Kindersley, on the second hearing of this case.[3] Each of these was capable of being exercised separately and independently of the other; they have distinct operations, and are not in any way capable of being blended together. When these new powers were created, the original power was exhausted and gone, and no power of revocation or of new appointment could be exercised except as reserved in the deed. By the deed of *1833, the powers reserved *725 in the deed of 1830 were exercised, and the two powers were again reserved; this was repeated in 1835. The power of appointment in each deed was not a power partaking of the character of the settlement of 1794, but was a new power created at the date of each of these deeds, and has a new character and a new value attached to it. It must be strictly followed in any subsequent deed. In 1836, Anne Evans exercised the power of revocation which she had reserved to herself in the deed of 1835, but she did not think fit to exercise the other reserved power, that of new appointment.

Where a power of appointment is exercised, and by the deed exercising it a power of revocation and a power of new appointment are reserved, that is a distinct and wholly different thing from a deed reserving the power of revocation, but not the power of new appointment.

The attempt here to exercise that latter power by will is therefore unwarranted by the reserved power, and the will is void. So far as intention is concerned, that is to be collected from these deeds themselves, and from nothing else, and the intention was

[1] 6 De G., M. & G. 654.
[2] O. Bridgm. 107, 113.
[3] 1 Drewry, 681.

to allow the provisions of the original settlement to take effect. The rule *expressio unius est exclusio alterius* applies here, and she must be understood, by simply revoking all that had been before done, to have intended to leave matters as if she had never possessed any power of appointment. If it had been intended to reserve the power of appointing "by will," those words ought to have been used, but they are not to be found in any one of the deeds; where one power alone is expressly given, the law will not imply another and a different one. *Hele* v. *Bond*[1] is in point. As to that, it is said in Sugden on Powers,[2] "the principle of the case was this: an instrument exercising a power must ex-
* 726 pressly * reserve the very power intended to be retained."

In *Ward* v. *Lenthal*,[3] it was expressly declared that, if the power to declare new uses was not reserved with the power to revoke, there could only be a revocation, but not a new appointment of uses. That case has never been questioned, nor is there such a distinction between that case and the present as was supposed by Lord Justice Turner.[4]

Montagu v. *Kater*[5] was relied on in the Court below, but that does not apply here, for the question there was simply whether there having been a joint power and a general exercise of it, and then a revocation, the power of the survivor continued. Nor is *Sheffield* v. *Von Donop*[6] an authority here, for that was a case relating to personal estate only, and had no reference to the law of powers operating by virtue of the Statute of Uses.

The Attorney-General (*Sir R. Bethell*), *Mr. R. S. Tripp*, and *Mr. Pearson*, and *Mr. Malins*, and *Mr. Bevis*, appeared for the different respondents, but were not called on.

February 19.

THE LORD CHANCELLOR (LORD CAMPBELL).—My Lords, this is a very important case, but with the most sincere respect for Vice-Chancellor Kindersley, I must say I think it is unnecessary to hear the counsel for the respondents. We have had the advantage of hearing a most learned and ingenious argument from two eminent counsel; and beyond that we have ample reports of the case as it was argued before Vice-Chancellor Kindersley and before the

[1] Prec. in Ch. 474.
[2] 8th ed. p. 374.
[3] 1 Siderf. 343, 2 Keb. 269.
[4] 6 De G., M. & G. 673, 674.
[5] 8 Exch. 507.
[6] 7 Hare, 42.

Lords Justices; and we are in possession, I believe, of all that can be said on the one side and on the other; and having deliberately considered all that can be urged on both sides, I have come to the conclusion that the decree of the Lords Justices ought to be affirmed.

* The question in this case is a very simple one, although * 727 so much of argumentation has been bestowed upon it. The only question is, whether the testatrix, in March, 1848, was entitled to appoint by will under a power created by a settlement in 1794. I was rather surprised to hear the learned gentlemen who argued in favour of the appellant deliberately contend that it was the intention of Mrs. Evans to extinguish her right to make such an appointment by will. They said truly that this was a question of intention, and that her intention ought to be regarded; but I see no ground whatever for saying that she was afraid of possessing or of exercising the testamentary power vested in her and remaining in her, or that she deliberately divested herself of that power, and guarded herself with anxiety against the possible exercise of importunity with respect to her testamentary disposition, or that it was only inserted as a part of the formalities of the deed, that she should have the power of dealing with this property by will. I cannot for a moment doubt that Mrs. Evans firmly believed, from the time when the power was created until she made her will, that she had the right of executing the power of appointment in that way. I can discover nothing in any part of the deeds to raise a doubt upon that subject. There is nothing in the deeds in the slightest degree inconsistent with the power to appoint by will being exercised if there should be a revocation of the appointment by deed. If, therefore, that right was extinguished, it must be merely that, unawares und unwittingly, she did, or omitted to do, something that deprived her of the power of appointing by will which she once possessed. We have to see whether, in point of law, any thing has been done, or has been omitted to be done, that has extinguished the right which she once had to appoint by deed or by will.

If it could be made out that, by the deed of 1830, or by * any of the successive deeds since, the power by the settle- * 728 ment was fully exhausted, there would have been great ground for the argument that has been urged on behalf of the appellant. If that power was extinguished, and only a new power created by deed, of a limited nature, it might well have been said

that she, having had the power to appoint by will, ceased to have that power. But, my Lords, there seems to me no ground whatever for contending that there was an exhaustion of the power created by the deed of 1794, that because there was a power of revocation the estates were defeasible. Lord Justice Turner makes it the real question in the cause, whether the original power contained in the settlement of 1794 has come to an end. That is, I think, the true question. I am of opinion that it has never come to an end. It was under that power that this will was made, and I think the will was a good execution of the power.

In all these successive deeds which this lady executed, there was a power of revocation reserved; and that power enabled her to revoke those successive deeds. Then, what was the effect of the revocation without any reservation of the power? Supposing that she had, by the deed of 1833, simply revoked the deed of 1830, without any reservation, I apprehend that then the power of appointment, either by deed or by will, would have been in her, and that she might have exercised that power either in the one way or the other. If the deed of 1836 had not been executed (a deed merely revoking the previous appointment she had made), I apprehend that things would have remained entirely as they were before that deed was executed.

Then great reliance is placed upon there being the expression of a reservation of power to appoint by deed, and upon nothing being said about the power to appoint by will. There is certainly * 729 an axiom of law, *expressio unius * est exclusio alterius.* But that is not of universal application. It depends upon the intention of the parties as it can be discovered upon the face of the instrument or upon the transaction. Now here, although there is an express power reserved to appoint by deed, and nothing is said about the power of appointment by will, it is clear that the reservation of the power to appoint by deed included the power of appointment by will, and that if she had said, "by will," it would only have been an expression of what was implied, and would have existed without the express reservation of that right.

Then Mr. Greene, in his argument, wished very much to insert the word "only;" and he asked how it would have been if the words "only by deed" had been introduced. The short answer to that is, that in that case it would have been a totally different instrument, and would have been subject to a totally different con-

struction. But if it was the intention of the testatrix that it should be *only* by deed, why was not that word introduced? The omission of that word is a proof to my mind that there was no intention whatever on her part to narrow the mode in which the appointment might be made, but to leave it as it had been created by the original settlement.

I do not think it at all necessary to enter into all the ingenious arguments that have been urged at the bar, for I think that when it is once established that there was not an exhaustion of the power, but that the power created by the settlement remained, all the rest necessarily follows, because it was under that power that the will was made. The will was made under the power just as much as it would have been if the will had been the first instrument in which the testatrix sought to execute the power which she originally had.

Unless, then, there is authority against it, I think this is * the plain and necessary inference arising from the instru- * 730 ment of 1835. I do not rely upon the cases of *Montagu* v. *Kater* and *Sheffield* v. *Von Donop*, for I do not think they very strictly apply to this case; but I am clear that there is no case upon the other side. Mr. Greene relied very confidently upon the two cases of *Hele* v. *Bond* and *Ward* v. *Lenthal*. I may just refresh your Lordships' recollection by referring to the manner in which Lord Justice Turner treated these two cases, and showed, I think, to demonstration, that they had no application to this case. He says: "Upon examining these cases, I think it will be found that they have no bearing upon the present case. In *Hele* v. *Bond*, there was a settlement with power to revoke, and to limit new uses, the power not being limited to a single revocation and new appointment, but purporting to enable repeated revocations and new appointments to be made. There was then a revocation with a limitation of new uses, but with no power to revoke, and afterwards a revocation of the uses first appointed with a limitation of new uses. It was held that the uses last appointed did not take effect. But the ground of this decision was, that the power contained in the original settlement, so far as it purported to enable repeated revocations and new appointments to be made, was not a good power, and we have in this case no such power to deal with. In *Ward* v. *Lenthal* there was a settlement with power to revoke and limit new uses; then there was a revocation with a limitation

of new uses, and with power to revoke, but with no power to limit new uses; and then there was a revocation of the uses limited by the first appointment with a limitation of new uses. It was in this case also held that the uses last appointed did not take effect. From the very loose reports of this case it is difficult to collect, distinctly, the ground upon which the decision proceeded; * 731 but as I understand * the case, they were these: the exercise of the power of revocation by the first appointment wholly destroyed the uses created by the settlement. The exercise by the second appointment of the power of revocation reserved by the first appointment destroyed the uses created by that first appointment, but did not affect the revocation of the original uses which had been made by the first appointment, and the consequence was that there were no subsisting uses. The fee, therefore, resulted to the settlor, discharged of all the uses; and it was held that the fee having so resulted, the seisin to serve the uses to be created under the power was gone, and that a new seisin was necessary to be created by him to serve the uses limited by the second appointment, a requisite which was supplied by the production of the second fine. But in the present case the fee does not result discharged of all the uses, as it was held to have done in the case of *Wood* v. *Lenthal*, for there is the power to appoint new uses reserved by the deed of 1835, which would attach upon the resulting fee." Therefore those two cases are clearly and satisfactorily disposed of. There is no authority in them to defeat the natural, and, I should almost say, necessary construction to be put upon these deeds. It was under the original power in the settlement of 1794 that the will was made, and therefore I think that the Lords Justices came to a right conclusion when they held that this was a valid deed, and I must advise your Lordships to affirm the decree.

LORD CRANWORTH: — My Lords, there is no doubt of the great importance of this case, and, considering its importance, it may have appeared at the first blush strange that this House should not have thought itself called upon to hear the argument * 732 * throughout; but a very little reflection will suffice to show that we should only have been wasting the public time if we had proceeded farther, because this is not a case in which the subject comes fresh to us. We have the advantage of very clear,

and I must say, exceedingly lucid reports, both of the arguments before Vice-Chancellor Kindersley, and of the subsequent argument before the Lords Justices, with the full and written judgments of all those learned Judges. I need hardly state that all the Lords who have taken a part in this discussion have felt it their duty to consider these reports very attentively; and having done so, and having had the benefit of hearing the argument on behalf of the appellant at the bar, it appeared to us that it would be quite useless to detain the parties or the public by any farther discussion on the subject.

My Lords, the question, though extremely important, I must say, when looked at, reduces itself within a very narrow compass. It is a case in which it is admitted on both sides, that we have no absolute right of authority to guide us, but that we have to go upon principle and upon principle only.

It appears to me that the two points which are put by Lord Justice Turner (I allude to him particularly, because he seems to me to put the case most clearly) conclude the subject.

In the first place, it has been said in the argument that the power to appoint by deed or will is a single power. Now, I am inclined to think, that the difficulties and mistakes in which the parties have been involved have arisen in great measure from taking that literally, and falling into the very common logical error of stating a proposition which is perfectly true, and then from some one term in that proposition deducing consequences which do not follow when the whole proposition is taken in its integrity. * It is a single power in one sense; that is * 733 to say, that when it is exhausted in one mode it cannot be exercised in the other. But it is not a single power in this sense, that if there has been an abortive execution in one mode which has come to an end and has wholly failed, then the right to exercise it in the other way does not arise. In that sense it is not a single power, but it is a single power with reference to the object; it is single in this sense, that when it is perfectly exhausted in the one mode, it cannot be exercised in the other.

It appears to me that this erroneous use of the expression, single power, probably led to the erroneous view which I think was taken by the Vice-Chancellor on this subject. Lord Justice Turner put this case: Supposing that when the deeds of 1830 and the following deeds were executed, this lady had said, " I intend

to exercise this right by virtue of the power of appointing by deed, but if this appointment should not ultimately prevail, I do not intend to affect the power of appointing by will," there can be no doubt that she might have done so. Now, do not the circumstances of the case show clearly that that was in her contemplation? The bare fact, that she exercises her power of appointment by deed, and expressly reserves the power only to revoke by deed, may indicate what was passing in her mind and in the mind of her legal adviser. I agree with Lord Justice Knight Bruce, that the object of the parties might have been carried into effect much more clearly. He asks, what were the lawyers about? The object might have been effected in such a way as to exclude all doubt. But that the meaning was to reserve full power by will as well as by deed, if the actual execution should be imperative, seems to me to be a legitimate conclusion, not only from the mode in which the power was attempted to be exercised, but also, if we * 734 may speculate upon what was * passing in the mind of the lady, from the fact that she made her will under the power just as if nothing had taken place, assuming, as she did, that it remained unaffected by what she had done.

I shall not go through the case again, because the bearings of the subject have been pointed out so distinctly by my noble and learned friend on the Woolsack, that I do not think it necessary farther to go into them. I think the case depends upon this general proposition: that although the power is, in one sense a single power, it is not single in the sense that if it is unexhausted and unexecuted in one mode, it may not be executed in the other, and the circumstances of this case clearly show that that was the intention of the parties with reference to the several deeds in question.

Lord St. Leonards. — My Lords, I hope, in common with my noble and learned friends, that our not calling upon the counsel for the respondents will not be considered as any want of respect to the learned Vice-Chancellor. It is impossible to read his judgment without being impressed with the great knowledge and power applied to the subject. It is very instructive; and it is no impeachment of it, that after the case has been bolted and sifted as it has been since it left his Court, this House, being called upon to decide between his judgment and that of the Judges of the Court of Appeal, has arrived at a conclusion in favour of the

latter. I say that, from the great respect which I feel for the learned Judge, whose decision upon this occasion we have not adopted.

My Lords, the law on the subject before us was left in an exceedingly doubtful and puzzling state, but I do trust that this case will be considered as laying down a principle * which the bar will have no difficulty in applying to other * 735 cases which may arise.

My Lords, the question to be considered is an abstract question, What is the effect of successive executions of powers upon the original powers and uses in a settlement where new powers have been reserved upon every occasion? For observe, in this case, till the last deed of 1836, which was a simple revocation, there is a chain of new appointments, with every time a new power of revocation, and of new appointment. We have now to decide upon the legal operation of the chain of deeds, one, two, three, till at last you come to a simple revocation with no appointment.

This case has been remarkably well argued by the counsel at the bar for the appellant; and they admitted that, if there is an original power of appointment, and then an execution of that power, with a reservation of a power of revocation only, followed by a revocation, the original power would revive. That is not disputed by these learned counsel; and it cannot be disputed, because it is a settled point of law. But they draw this distinction, that if, in the instrument granting the original power, there be a power of revocation and new appointment reserved, that puts an end at once to the original power, for the deed amounts to a new settlement, and no revocation under it can set up the original settlement. Now let us try the point upon the first deed in 1830; before doing which, I may observe, with great submission to the learned Judges of Appeal, that I see no ground whatever for supposing that we are to restore the deed of 1833. I look in vain for any ground upon which that deed can be restored in preference to any other. If any thing is to be restored it must be the original settlement, which stands thus: there is a power of appointment by deed or will, and in default of appointment uses * which * 736 exhaust the fee. Then by the deed of 1830 the power is exercised, but with a power of revocation and new appointment by deed. In the next deed she revokes the uses of that deed, and she makes a new settlement, but reserves the like power of revoca-

tion and new appointment by deed. And so she proceeds, revoking the preceding deed and appointing new uses, with, in every case, a power of revocation and new appointment by deed. Let us look at the first appointment: if after it was revoked, the case had stood upon the revocation, without any new appointment, the original settlement with all the original powers would stand revived. There can be no question about that. Then comes the new appointment; what does that do? That introduces a new settlement with a like power of revocation and new appointment. If the first deed has not the effect of at once destroying the original power of appointment, how can the second, when each is a link in the chain? The third appointment is just the same. The second removes the first, and the third removes the second, and at last you come to the simple revocation which forms the last link in the chain: the result is exactly the same as if you had started with the case which is admitted and not disputed, namely, that the revocation restores the original power. I put down the different links in the chain in juxtaposition with the simple case, and striking them out as they are revoked, I find that I arrive at exactly the same conclusion, as the case stands, as in that which is admitted to be law.

But then it is said that the introduction of new uses every time operates as a new settlement, and the party can only take under the new uses or exercise the new power. The answer to this objection is, that none of the new uses is an irrevocable appointment, but they were all subject to revocation, and were all suc-
* 737 cessively revoked; and * when no longer in existence, the case stands precisely upon the same grounds as if the final revocation, without any new appointment, had been in the first deed of appointment instead of the last.

Now, I must say, that this is a satisfactory conclusion, because it makes a clear rule of law, which is, that in these cases, as often as you remove, with power to do so, the uses which you have introduced, no impediment occurring, you restore the original power. This only will carry into effect the intention of parties.

The learned Judge in the Court below asked how these powers could be co-existing? The learned counsel pressed that very much and very properly. They said, if you introduce a power under a new appointment, with new conditions, must not there be an exclusion of the old? It may be intended as a substitution;

but supposing that power not to be exercised, you have the original power again. Besides, cases have occurred in which, upon a new settlement being made, powers of sale and exchange have been introduced, although there were subsisting powers of sale and exchange in the original settlement, and effect has been given to the latter. There you have two co-existing powers under different settlements, and yet either one or the other might be exercised. So that, without saying that the new power reserved, to be exercised in a different manner, would not be a power undoubtedly to be executed in that manner, yet, supposing it not to be executed *modo et formâ*, it has no operation. But what is to prevent the original power being in existence? You have, in the exercise of the original power, created a power which you have not executed. You have not interfered beyond the mere reservation of the power. You have not gone on to execute it. The case was put at the bar in this way: suppose you create a term of years,—well, everybody *knows that if there be a *738 term of years, a positive and absolute estate, it is a partial execution; it does not simply operate upon the power to appoint by deed; it operates equally upon the whole power by deed or will. But then it is said, Suppose there is the conveyance of the fee in the exercise of that power? In that case, the whole estate is gone, there is a total execution, and there is an end of the settlement. You cannot do more than dispose of the fee simple. But when you introduce a power of revocation and new appointment, it is a totally different thing, because there you create only a defeasible estate, and the consequences which I have pointed out follow.

Now, I will say a word about the power to appoint by will. Look at the intention. All these instruments are accurately framed; there is not one of them that is not technically framed in the strongest sense of that word. Speaking of intention, I have had occasion in this House to make the observation before, that if I find, as a Judge, an instrument technically framed, I must give to it a technical construction. I must give to it the construction which I know the framer of that instrument, using technical expressions, meant to convey. And, although I am not to lose sight of intention, yet I must look at it with the eye of a lawyer, and say what the framer meant. What the framer says, giving a picture of the man's mind, I must take to be a true representation.

strongly argued, and I do not wonder at it, because it had a great effect upon the mind of the learned Vice-Chancellor, that this was a single power, — I think, perhaps, that is rather a play upon words — I do not see any difficulty about it — you may call it a single power if you please, it is a single power in one sense, — a power to appoint by deed only, or a power to appoint by will only; each one taken by itself is, however, a very different thing from a power to me to appoint by deed or will. In this case I have a choice, and it is at least equal to the two powers separately. Supposing this lady had chosen to appoint by will twenty times over, that would not have affected her powers to appoint by deed. If she had made half a dozen wills in succession, she would just as readily have believed that she had a power to execute by deed, and she would have had a power to execute by deed half a dozen times over. She believed, as she was informed, that she had power to execute by will. We are not now speaking of the operation either of the deed or of the will, *qua* deed or will, but we are speaking of the intention of the parties in the framing of the power and in *742 the execution of it. I say that I can see no * distinction between the execution, half a dozen times over, of the power by will, leaving the power by deed, most unquestionably in that case, as we should all admit, to be executed whenever she thought proper, and the execution half a dozen times over of the power by deed, leaving the power by will unexercised. But I find a great deal of force in the observation that having executed it half a dozen times over by deed, she might still execute it by will. The result, therefore, would be that whenever all these different limitations had ceased, the original power would revive; that is, a power to appoint by deed or by will.

I am, therefore, clearly of opinion with my noble and learned friends, that there is nothing inconsistent in the power remaining at the time of the revocation. For the new power of appointment by deed is no more inconsistent with the still continued existence of the original power to appoint by will than it was in the creation of the original power itself. It is just as consistent at the end of the time as it was at the beginning, when the original settlement was made.

Now let us look a little at the cases of *Ward* v. *Lenthal* and *Montagu* v. *Kater*. *Ward* v. *Lenthal* has of course introduced a great difficulty. I have tried to explain it out of this House; it

was difficult, but I believe that our decision in this case will remove all future difficulty. But let us for a moment look at the authorities, and see what has been done. I cannot agree that *Montagu* v. *Kater* is not a very great authority. I subscribe wholly and entirely to that decision, and I subscribe wholly and entirely to the grounds upon which it was made, and I think that it decides this case. I can see no real difference between the two cases. It will be seen when they are put in juxtaposition how exactly they are identical. In *Montagu* v. *Kater* there was a limitation to the husband and wife for
* life, and then to their children as they should appoint. In * 743
considering this question in the Court below, the learned
Judges agreed to consider it as if it was a general power, the same as it was there. After the death of the husband and wife the limitation was to the children as they should jointly appoint, with or without power of revocation and new appointment, and in default of joint appointment as the survivor should appoint by deed, and in default of such appointment to certain uses. What was done was this: there was a joint appointment to a son in fee, with the reservation of a joint power of revocation and new appointment. That exhausted the fee amongst their children, but, subject to revocation, it was argued that the fee was absolutely gone. The husband and wife afterwards revoked the uses of the latter deed, but made no new appointment. The husband, who had survived his wife, by his will, under the power in the original settlement, appointed the estate once more to the same son in fee. The Judges of the Court of Exchequer held, and I think perfectly rightly, that the joint revocation had the effect of reviving the original joint power. They state so in so many words; they say, "By the execution of the joint power the estate was limited to the defendant in fee. The revocation of that appointment, also jointly made, revived the original power of joint appointment, and with it the dependent power of appointment by the survivor in case of default." The Court of Exchequer thus decided that the joint revocation restored the original joint power, in which I entirely concur. Then the appointment was by the survivor, whose power was of course saved. How exactly that dovetails with this case, because the joint power of appointment in that case was equal to the separate power of appointment in this case. The circumstance that in that case it was an appointment to two makes no

*744 difference. In neither case * was the power of appointment exercised. In that case it was a joint power of appointment and no appointment. Here there is a single power and no appointment; therefore that case is as nearly like this as it well can be. But as far as regards the effect (which I am now looking to) of removing the previous uses created under the power, and not exercising the power of new appointment, which was coupled with the power of revocation, which latter power was exercised, it appears to me that that case is entirely an authority for what we are now doing; and I am very glad to have such an authority, because with that authority, and with the weight which the decision of this House in this case will necessarily carry with it, I believe that all farther difficulty upon this subject will be removed. I am very glad that we are giving effect to the intention of the will; and I am satisfied that in point of law it is a valid will under the power created by the settlement of 1794, which has never been otherwise executed, and has never been released or extinguished, and which stands, therefore, not in opposition to any estate created by this lady, but as a perfect testamentary disposition under the power created by the settlement. Therefore, I entirely agree with my noble and learned friends that the decision of the House should be to affirm the decree of the Lords Justices.

Mr. Daniel.—I trust that your Lordships will think that this is a case in which, having regard to the conflict of judicial decisions, the appellant was justified in taking the opinion of this House.

THE LORD CHANCELLOR.—We must adhere to the general rule as to costs, unless there is strong ground for departing from it.

Decree appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 19th February, 1861.

*PHŒNIX LIFE ASSURANCE COMPANY v. SHERIDAN. * 745

1860. August 13.

THE OFFICIAL MANAGER of the PHŒNIX LIFE ASSURANCE COMPANY, ... } *Plaintiff in Error.*
H. B. SHERIDAN, ... *Defendant in Error.*

Life Policy. Condition Precedent.

S. effected an insurance on the life of B. The policy was headed with these words: "Annual premium, 33*l.* whole term, payable by quarterly instalments of 8*l.* 5*s.* each." The policy was dated 2d August, 1856, and recited that "the assured had paid 8*l.* 5*s.* as the premium until 2d November." It then witnessed that "if B. shall die within twelve calendar months from the date hereof, or shall live beyond such period, and the assured shall on or before that period, or before the expiration of every succeeding twelve calendar months, pay the amount of premium," &c., the insurers should be liable: provided, "that if B. shall die before the whole of the quarterly payments shall have become payable for the year, the directors may deduct from the sum insured the whole of the premiums for that year, reckoning it to commence from the 2d of August." B. died after the third quarterly instalment had become payable, but before it was paid. In an action on the policy, the defendant pleaded that the non-payment of this third instalment rendered the policy void: —

Held, that the plea was an answer to the action.

THIS was an action on a life policy. Sheridan, on behalf of "The Times Life and Guarantie Society," effected an insurance with the Phœnix Company on the life of a person named Blomberg, resident at Berlin. The policy, which was dated 2d August, 1856, was headed thus: "Sum assured, 1000*l.* No. 3115. Annual premium 33*l.* whole term, payable by quarterly instalments of 8*l.* 5*s.* each," and it contained the following recitals and provisions: "Whereas the assured has paid to the company the sum of 8*l.* 5*s.* as the premium for the said insurance until the 2d day of November, 1856: Now this policy witnesseth, that if the said Blomberg shall die before the termination * of twelve * 746 calendar months from the date hereof, or shall live beyond such period, and the assured, &c., shall on or before that period, or on or before the expiration of every succeeding twelve calendar

months, provided Blomberg be still living, pay or cause to be paid at the office of the company the annual amount of premium, then the funds" of the company shall be liable. "Provided always, that if Blomberg shall happen to die before the whole of the said quarterly payments shall have become payable, under these presents, for the year in which he shall so die, it shall be lawful for the directors to deduct and retain from the said sum of 1000*l.* so much as will be sufficient to pay and satisfy the whole of the said premiums of that year, reckoning the said year to commence from the 2d day of August." There was then a provision about Blomberg going abroad, or if he "shall die by duelling or by his own hand before he shall have been assured by the company fifteen months, and made two annual payments to the company, this policy shall be void," &c. The declaration alleged the death of Blomberg, and the performance of all the conditions precedent to entitle the plaintiff to payment.

The defendant pleaded that Blomberg died within twelve calendar months from the date of the policy, and after the third of the quarterly instalments or payments of 8*l.* 5*s.*, each becoming payable according to the said policy, had become due; and at the time of his death, the third of the instalments was unpaid, and never was paid, although the defendant was ready and willing to renew the same when it became payable; and by the said non-payment the policy became lapsed and was void. Demurrer and joinder. In Easter term, 1858, the Court of Queen's Bench gave judgment for the defendant, on the ground that this was a policy from * 747 quarter to quarter, * leaving to the assured the liberty to drop it at the end of any quarter, and not imposing any continuing liability on the insurer, unless the quarterly payment is made at the end of the quarter; and farther, that the condition as to the payment of all the quarterly premiums was a condition precedent.[1] The Exchequer Chamber reversed this judgment, on the ground that it was an annual insurance, for a year and from year to year, time being given to pay the annual premium by quarterly instalments; and that the absence of any express promise to pay, and of any provision as to the consequence of non-payment of the quarterly premiums, prevented their payment from being a condition precedent.[2] This proceeding in error was then brought.

[1] Ellis, B. & E. 156. [2] Id. 160.

Mr. Prentice for the plaintiff in error.—The question is, whether the quarterly payment of the 8*l.* 5*s.* is a condition precedent to the liability of the office. It is so, for the policy is a quarterly policy, and each quarterly payment must be made before the death of the life insured. The word "annual" in the policy is only descriptive of the whole amount of premium to be received within one year, but the provisions of the policy are all made in relation to the quarterly payments, and if they are not regularly kept up, the policy becomes void. The provision as to deducting the amount of unpaid premium from the sum insured refers distinctly to a quarterly payment, then accruing but not actually due.

Mr. Milward and *Mr. Bushby* for the defendant in error.—The construction on the other side cannot be maintained without striking out from the heading of the policy the * word * 748 "annual," and substituting in the provision for payment the words "three calendar months" for "twelve calendar months." The policy is an annual policy, and the contract was created by the first payment, though for reasons of convenience that payment did not amount to the whole annual premium. It is not a contract which requires to be renewed from quarter to quarter, for had it been so, that would have been expressly stated, whereas the description at the head of the policy shows that the policy is annual, and that the division of payment into quarterly instalments is merely a mode by which that annual payment is to be effected. An arrangement of that sort made for the convenience of one or other, or both of the parties, cannot affect the nature of the contract. On the failure to complete the payment of the annual premium when the whole of the annual premium had become due, the policy would be void; but it would not be so on the failure to pay any one of the intermediate quarters, for that would be to change the declared nature of the policy.

August 13.

THE LORD CHANCELLOR (LORD CAMPBELL).—In the construction of this very doubtful policy, I am sure that I should have been extremely ready to declare my opinion to be changed, if, upon hearing the arguments at the bar, and upon reading the judgment of the Lord Chief Baron in the Court of the Exchequer Chamber, and hearing the case argued ably and zealously, I had thought that

the Judges of the Court of Queen's Bench had put a wrong construction upon it. But I adhere to the judgment which the Court of Queen's Bench gave. And my advice, therefore, is, to reverse the judgment of the Court of Exchequer Chamber.

* 749 LORD CRANWORTH. — I have come to the same conclusion.

When first I read the policy I was inclined to think that it might be construed as the Court of Exchequer Chamber construed it. But now I think, with as little doubt as can exist on the words of a policy so obscure as this, that the meaning is this: that if Blomberg shall die before the termination of twelve calendar months from the date thereof, or shall live beyond such period (that is providing for another contingency), and the assured shall on or before that period, while Blomberg is living, pay or cause to be paid the annual amount of premium, that is the annual amount of premium as is hereinbefore stipulated, that is, by four quarterly instalments, then the funds of the company shall be liable. But then this occurred to the framers of this policy, that Blomberg might die after one quarter only, and then they would have got only a quarter of the annual premium instead of the whole. Then to meet that, this proviso was introduced, that if Blomberg should happen to die before the whole of the said quarterly payments shall have become payable for the year in which he shall so die, it shall be lawful for the directors to deduct the amount of the subsequent quarters. That proviso was not meant to apply to the case of a default of payment, but to the case where the payments had been regularly made as they became due, but where all the instalments had not become due. That appears to me to be the proper construction, and it is in conformity with the decision of the Court of Queen's Bench. And, therefore, I think that the judgment of the Court of Exchequer Chamber ought to be reversed.

LORD CHELMSFORD. — My Lords, I agree with my noble and learned friends in the conclusion at which they have arrived.

* 750 I certainly, * like my noble and learned friend near me, for some considerable time was of opinion that the Court of Exchequer Chamber had put the right construction upon this policy. But after careful consideration of the arguments which have been addressed to us, I am clearly of the opinion that the conclusion at which the Court of Queen's Bench arrived is the correct one. I

must say at the same time, that I do not agree with those who think that it is a policy from quarter to quarter. I think it is an annual policy, but it is an annual policy of which the premium is payable by quarterly instalments. Then the nature of the contract, as I gather from the operative words of the policy, is that "if Blomberg shall die before the termination of twelve calendar months," and if he "shall on or before that period pay or cause to be paid the annual amount of premium," then the policy shall be paid. Now what is the meaning of those words "the annual amount of premium?" Why, "the annual amount of premium" according to the stipulations of the policy, that is "the annual amount of premium" payable by quarterly instalments. Therefore, as the quarterly instalments become due, he must pay the quarterly instalment which is due. But of course he does not pay quarterly the annual amount of premium which entitles him to the benefit of his assurance. And reading it in that way, then the policy is perfectly consistent, though I acknowledge that for some time I had some little difficulty as to the construction at which I have ultimately arrived. The policy, artificially and strangely as it is drawn altogether, is, in some degree, in the most important parts of it, rendered consistent in this way of viewing it. Because then, as my noble and learned friend puts it, this proviso, with regard to Blomberg dying before the whole of the quarterly payments shall have become payable, does not provide for the case of default of payment, * but it provides * 751 for the case of the party dying after having paid regularly the quarterly instalments which had become due previously to his death, but before others had become due; giving undoubtedly to the insurers that which it was intended they should receive, namely, the whole of the annual premium, or allowing them to deduct the quarterly instalments, which had not become payable, out of the money which would be paid for the assurance.

This appears to me to render the whole policy perfectly consistent. And therefore I think that the judgment of the Court of Exchequer Chamber was erroneous, and ought to be reversed.

Lord Kingsdown.—My Lords, I am of the same opinion.

Judgment of Exchequer Chamber reversed.

Lords' Journals, 13th August, 1860.

MIDLAND RAILWAY COMPANY *v.* TAYLOR.

1862. March 11.

THE DIRECTORS and others of the MIDLAND RAILWAY COMPANY, ... } *Appellants.*
ROBERT JOHN TAYLOR, ... *Respondent.*

Railway Company. Forgery. Partnership. Equitable Relief.

Though a right to an action at law and a right to sue in equity spring from the same transaction, and though the personal representative of the person having these rights may, by special circumstances, be prevented from maintaining an action at law, his right to sue in equity will not thereby be lost.

T. and B. were partners. Stock was standing in the books of a railway company in their joint names. B. sold out the stock by a deed which he executed and to which he forged the name of T., but he continued to account to T. for the dividends, and T. died in ignorance of the forgery. T.'s personal representative afterwards filed a bill against the company for a re-transfer of the stock: —

* 752 * *Held*, that though by the death of T. the right to an action at law was gone, the right to a suit in equity still remained, and a decree directing the company to re-transfer the stock was sustained.

THIS was an appeal against a decree of the Master of the Rolls.

John Taylor was a merchant at Hull, and had one Henry Smith Bright as his partner. There were two hundred and thirty-six shares (stock) of the Midland Railway Company,[1] which stood in

[1] The Company's Acts material to be referred to, are the 6 & 7 Wm. 4, c. 107, and the 7 & 8 Vict., c. 18. By the 104th clause of the former of these Acts, the company was required to keep a registry of the names of the shareholders; by the 145th clause, proprietors were to be enabled to transfer their shares by deed, and on every sale the deeds (being executed by the seller and purchaser) were to be kept by the company, and a memorandum thereof entered in a book, and until such entry the purchaser was not to have any share of the profits. The 30th clause of the 7 & 8 Vict., c. 18, enacted that "the company shall not be bound to see to the execution of any trust, whether express, implied, or constructive, to which any of the said shares may be subject; and the receipt of the party in whose name any such shares shall stand, shall, from time to time, be a sufficient discharge to the company for any dividend or other sum of money payable in respect of such shares, notwithstanding any trust to which such shares may be subject, and whether or not the company shall have had notice of such trusts, and the company shall not be bound to see to the application of the money paid upon such receipt."

the books of that company in the joint names of Taylor and Bright, though it appeared that Bright's real interest in them, if any, was very small. Bright, however, was in the habit of receiving dividends, and accounted for them to Taylor. Taking advantage of the opportunity he thus enjoyed, Bright, in September, 1852, sold out the stock and executed a deed of transfer, to which he forged the name of Taylor. Subsequently to the sale, Bright accounted to Taylor, as he had done before, for the dividends on the stock, as if it had been still unsold. * Taylor died in January, 1856, entirely ignorant of the forgery which had been committed. The directors acted on the forged deed of transfer, altered the registry book as to these shares, struck out the names of Taylor and Bright, inserted the names of the transferees, and had since paid the dividends to them. Bright, after the death of Taylor, became bankrupt; the forgery was discovered, and he was prosecuted and convicted. * 753

In August, 1859, the respondent, as the legal personal representative of Taylor, filed his bill against the appellants, and against the assignees of Bright, praying that the appellants might be ordered to pay him the dividends which had become due on the shares since Taylor's death; to appropriate an equal amount of stock to indemnify Taylor's estate; or to be restrained from setting up, in any action that might be brought against them, any defence in the name of Bright or his assignees, and for general relief.

The case came on before the Master of the Rolls on the 25th April, 1860, when his Honour was pleased to declare that the plaintiff was entitled to the relief which he sought, the appellants receiving credit for the dividends which had been actually paid to Taylor.[1] The appeal was against this decree.

Sir H. Cairns (*Mr. Knowles* appeared with him) for the appellants.—The question here is, What are the legal rights of the respondent and the legal liabilities of the appellants? The appellants are bound to keep a proper registry of shares; but there their duty ends. *Sloman* v. *The Bank of England*[2] is not an authority for the decision here, * for in that case the defrauded trustee was alive, and his legal rights were complete and were enforceable, and the duty of the Bank of England, * 754

[1] 28 Beav. 287.

[2] 14 Sim. 475.

with regard to the holders of government stock, is different from that of a railway company, as to the holders of its shares. Here Bright duly executed the deed of transfer; all that the appellants did was to act on a deed which, as to them, was a lawful authority for the transfer; but if not so at that time, was so afterwards, for Bright becoming the survivor of the two partners, became the *dominus* of the stock. At that time he might lawfully have sold and transferred it, and no one could have raised any complaint that the appellants acted on his authority. The appellants were not trustees of the stock, nor were they bound to take notice of any trust affecting it; the Act expressly exempts them from such a duty. Bright having, on the death of Taylor, become lawfully entitled to deal with it, the whole transaction was rendered valid. There was then no one but Bright who had a legal right, which the appellants must have recognised, and Bright was estopped by his own act from asserting any claim to the stock.

The bill itself shows that the respondent has no remedy in equity, for it alleges that "no proceeding at law can be taken against the company in respect of the said shares." If so, there is none in equity. The one rests on the other. They spring from the same cause, and if one fails the other is gone.

The Master of the Rolls improperly restricted, in this case, the effect of that clause in the Company's Act which exempts the company from any liability to take notice of trusts, and justifies it in transferring stock on the order of the person who appears as the legal owner. Here, too, his Honour adopted the doctrine of *Davis* v. *The Bank of England*,[1] and treated the deed as a *755 nullity. It might *be so until the death of Taylor, but on that event Bright became the sole person entitled to the property. There was, after the death of Taylor, no legal owner of the stock but Bright, and he was estopped from any legal proceeding.

[THE LORD CHANCELLOR. — Might not Taylor himself have brought a bill for the re-transfer of the stock?]

He might; but he never did so. When he died, the only right to the stock existed in Bright, and the representative of Taylor could not maintain any proceeding whatever.

[THE LORD CHANCELLOR. — Did not Taylor's right to sue pass to his representatives?]

[1] 2 Bing. 393.

For the reason just stated, it did not.

[THE LORD CHANCELLOR. — Though a remedy at law is gone, may not a remedy in equity remain?]

Not necessarily. Bright could, the day after Taylor's death, have executed a valid deed of transfer, and then the company would have been in the same situation as if the original deed had been valid. For reasons of his own he did not; but the company is, through the effect of his survivorship, in the same situation as if he had executed it; and it being admitted that, in consequence of the position and the legal right of Bright, the respondent has no title to sue at law, he cannot ask in equity what he has no title to seek at law.

The Solicitor-General (*Sir R. Palmer*), *Mr. Selwyn*, and *Mr G. L. Russell*, appeared for the respondent. — On their consenting to the correction of a merely formal matter in the decree, which had been referred to in argument, but had not been set forth as one of the grounds of appeal, —

* THE LORD CHANCELLOR (LORD WESTBURY) said. — Then, * 756 my Lords, I conceive that it will not be necessary to hear the counsel for the respondent. The matter rests on the plainest and clearest principles. Certain stock of the Midland Railway Company was standing in the book of the company in the names of two persons, Taylor and Bright. Bright, by a transfer executed by himself in Taylor's lifetime, and to which he forged the name of Taylor, transferred that stock to a third person. Immediately on that act being done, there was a right of action at law in Taylor against the railway company, and there was also a right of suit in equity. The right of suit in equity and the right of action at law were both founded upon a legal title; that legal title vested in Taylor, remained with him, and is now vested in the present plaintiff, his personal representative.

There can be no possible doubt that there is a title in that personal representative to call on the company to replace the stock. That right has been declared by the decree of the Master of the Rolls, and it is impossible to say that the right, which existed at the time when the forged transfer was made, is taken away and lost by the accidental circumstance of Taylor subsequently dying in the lifetime of Bright. I apprehend that the whole argument is

founded on a fallacy, and that the decree of the Court below was clearly right.

A point was subsequently mentioned of an accidental error that was made in the form of the order on farther consideration. That should be corrected; it was not, as has been very properly and candidly stated by counsel for the appellants, the ground on which the appeal was presented. I apprehend therefore your Lordships will be of opinion that there is no ground for dealing with this appeal in any other manner than as its merits re-
* 757 quire; and I therefore * submit to your Lordships that the appeal should be dismissed with costs.

LORD CRANWORTH.—My Lords, I do not think it necessary to add more than a single observation to what has fallen from my noble and learned friend.

It is said that the right in equity is dependent on there being a right at law. That is a mistake; it is not dependent on such a right at law. There would have been no right in equity if there had not been a wrong, which would have entitled the party to bring an action at law; but as to the principle, *actio personalis moritur cum personâ*, that cannot be applicable here, for even though the right of action at law is gone the right in equity remains, which clearly is to have a specific transfer of the stock which has been improperly transferred.

LORD CHELMSFORD and LORD KINGSDOWN concurred.

Decree affirmed, and appeal dismissed with costs.

Lords' Journals, 11th March, 1862.

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jects of charity, the increased income will belong to the body to which the lands have been given, and the other objects can claim nothing beyond the specific charges. — *Id.*

All such cases are questions of the intention of the donor, to be determined by the construction to be put on the language he has used. — *Id.*

Henry VIII. directed by his will certain provision to be made for the Dean and Canons of Windsor, and the maintenance of the Poor Knights there. As to the former, he directed that they should provide priests to say masses at his tomb at specified times, and to keep certain obits, and at every obit to give to the poor "in almes ten pounds." As to the latter, he gave 12*d.* a day, and a gown of white cloth and a mantle, with an additional payment of a specified sum to the chief of the Poor Knights. Edward VI. made provision for carrying this will into effect. Deeds were executed for granting lands * to the Dean * 762 and Canons, the Crown reserving to itself a power of directing the distribution of the funds thus provided, and the Dean and Canons covenanting to bestow the rents, to a certain amount, as the Crown should think meet. This power was not exercised in the reign of Edward VI., but in that of Elizabeth a deed was executed, and ordinances were made, directing what sums were to be paid to the knights, and what gowns and mantles they were to receive. The deed contained the following declaration: "Which said lands and other premises amounting to the said sum of 661*l.* 6*s.* 8*d.*, we will, &c., shall remain to the said Dean and Canons and to their successors for ever; that is to say, for the maintenance of the charges of 430*l.* before declared, and the residue, being 231*l.* 6*s.* 8*d.*, to remain for the vicars and serving priests' wages, when need requireth reparation of the said lands, the officers' fees, and for the relief of the said Dean and Canons, and their successors." There was no provision for reducing these payments in case the rents should fall short of the sum stated. The deed, as found in the Chapter House at Westminster, had the Great Seal attached to it, but was not shown to have been executed by the Dean and Canons, but their muniments contained an unexecuted copy of it, and they entered into possession of the lands and rendered accounts to the Crown, showing, among other things, the regular payment of the sums to the Poor Knights: —

Held, that proof of the execution of this deed by the Dean and Canons was unnecessary, that its provisions were binding on them, and that, on the construction to be given to the intention manifested in the will of Henry VIII., and in this deed, the lands were given beneficially to the Dean and Canons, and the Poor Knights of Windsor were not entitled to a proportional share in the increased value of these lands. — *Id.*

The will of Henry VIII. had no effect in conveying the demesne lands of the Crown; they were conveyed under the deed of Edward VI.; and after the execution of Elizabeth's deed and ordinances no part of the profits was impressed with any general unspecified charitable trusts, and no interest; nor any resulting trust remained in the Crown. — *Id.*

CHURCHMEN. See DISSENTERS.

7. Two persons, husband and wife, made their separate wills. In the husband's will the property was given to his wife, "and in case my wife shall die in my lifetime," then to W. W. in trust for the children on their coming of age; and, in case all of them should die under age, then to W. W. for his absolute use and benefit. In the wife's will (made under a power given by her deceased father, in default of the exercise of which the property was to go to relatives specifically named) the property was given to the husband (subject to interests in the children), "and in case my husband should die in my lifetime," then to W. W. absolutely. The husband and wife and two children perished at sea, being all swept off the deck by one wave, and all disappearing together: —

Held, that there was no presumption that the husband had survived the wife, or the wife the husband. — *Id.*

8. *Held* also (Lord Campbell, Lord Chancellor, *diss.*), that on the true construction of the wills, it was necessary for W. W. to show affirmatively that one or other had survived, and that in the absence of such proof, the property went to the relatives specifically named in the will of the wife's father, as if * there had been no will by the husband, * 783 nor any appointment by the wife. — *Id.*

9. *Held*, likewise (Lord Campbell, Lord Chancellor, *diss.*), that the union of the characters of legatee under the husband's will, and appointee under the wife's will, did not place W. W. in a situation of greater advantage than if the two characters had been held by different persons. — *Id.*

10. In applying the rule that a clear gift in a will is not to be cut down by any subsequent provision, unless the latter is equally clear, the plain intention of the testator, and not the comparative lucidity of the two parts of the will, is to be regarded. — *Randfield* v. *Randfield*, 225.

11. Where a testator made a will in 1837 (before the Wills Act), but did not execute it till 1844, and in the meantime one contingency mentioned in the will had gone, the words in the will were construed without reference to that contingency. — *Id.*

12. A testator devised all his freehold and copyhold estates to his son "when he have obtained the age of twenty-one years upon the following conditions," and directed that his widow should receive an annuity out of these rents; he then gave to his son all his personal estates, consisting of ships, bonds, and funded stock, &c., "but should the hand of death fall on my widow and son, and my having no other children, or my son any issue, my will is then that should he leave a widow she shall receive an annuity out of my real estates as before mentioned, the residue then to be equally divided, share and share alike, after paying such legacies as I may hereafter name, the division to be" between certain persons specifically mentioned "(they paying all my son's debts, funeral expenses and demands, or my wife's, should she be the longest liver)." The son became twenty-one some years before the will was executed; he married, but died without ever having had issue: —

THE END.

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